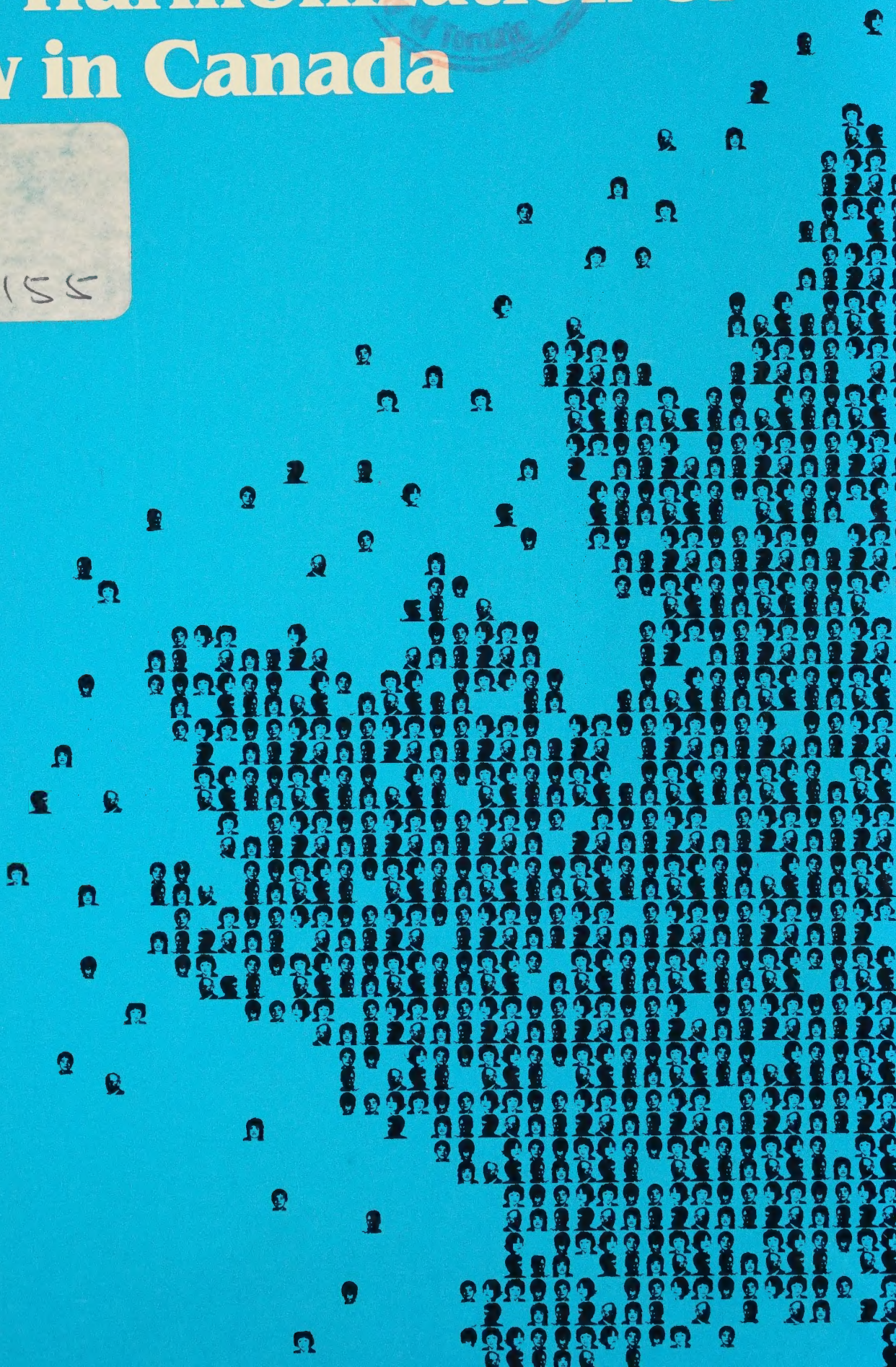
RONALD C.C. CUMING, Research Coordinator

Perspectives on the Harmonization of Law in Canada



Perspectives on the Harmonization of Law in Canada

This is Volume 55 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada.

The studies contained in this volume reflect the views of their authors and do not imply endorsement by the Chairman or Commissioners.

Perspectives on the Harmonization of Law in Canada

RONALD C.C. CUMING
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FOREWORD

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September, 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 72 volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*
- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they

organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

The studies contained in this and a companion volume are part of the work of the Law and Constitutional Issues Research Program of the Royal Commission and were prepared by the participants in the section of the program on the harmonization of law in Canada. The studies explore many of the fundamental questions associated with efforts to bring the disparate laws of Canada's thirteen jurisdictions into harmony.

The available evidence indicates that at least some of the Fathers of Confederation accepted with considerable reluctance a federal form of constitutional structure for Canada. Their mistrust no doubt was induced, in part at least, by the war and chaos then occurring in the United States. Fortunately our federal system has, for the most part, worked reasonably well. What is surprising is that it has functioned without effective mechanisms to facilitate harmonization of laws that deal with matters of national importance. While a significant degree of harmonization has developed in certain areas of Canadian law, it is not the product of a conscious choice by legislators to deal with matters of national concern in a coordinated manner.

Two basic questions underlie the studies in the two volumes of this research section: (1) Has the time come when Canadians can no longer afford to permit legislators and government administrators their former freedom to pursue narrow, parochial interests with little regard to national interests? (2) If a greater measure of coordinated policy development and implementation is required, what institutional restructuring will be necessary?

The importance of having mechanisms to facilitate harmonization of law in Canada was recognized early in Canadian history. Measures were included in the British North America Act to achieve uniformity of the law of the provinces. In 1918, the Uniform Law Conference of Canada

was created with the objective of securing uniformity of provincial legislation throughout the country where necessary and practical. However, the constitutional measures were ineffective, and the Uniform Law Conference has been much less successful than its creators and supporters had hoped. Is the lack of success a product of institutional failure or the lack of political will on the part of Canadians and their governments? These studies do not provide a definitive answer to this question. What they do provide is background information in a general context and in the context of five specific areas of the law, which will help readers reach their own conclusions.

Each volume begins with a general discussion of harmonization of law in Canada. In the Overview contained in the first volume, I explore some of the fundamental issues that are associated with efforts to harmonize the laws of the various jurisdictions of a confederation. In particular, I examine the inherent contradiction between the concepts of federalism and interjurisdictional harmonization of law. In addition, I describe and assess the various mechanisms that have been employed throughout Canadian history to secure harmonization of law.

Professor Ziegel's study, which begins the second volume, looks at harmonization of law in Canada from a slightly different perspective. The author proceeds from the assumption that harmonization is a positive and necessary feature of Canadian development. He explains why harmonization measures have been so ineffective in the past and offers proposals for institutional re-organization and re-orientation designed to facilitate harmonization of law in the future.

The five other studies examine harmonization of specific areas of the law, chosen because they best illuminate the problems associated with harmonization efforts in many other areas. Professor Neilson's study of harmonization of consumer protection law focusses on the difficulties associated with harmonization of law in an area where both the federal parliament and the provincial legislatures have jurisdiction. Professor Wuester's study of education law demonstrates that few areas of law can be viewed as having only local significance. The study of harmonization of securities law by Professor Anisman and the study of harmonization of insurance law by Professor Baer display the important role that bureaucracy plays in harmonization of certain areas of the law. Professor Anisman's study points to the limitations of harmonization by the bureaucracy, and Professor Baer's points to some of the dangers to democratic lawmaking that are associated with it.

From the early days of Confederation it has been argued that, if nothing else, basic commercial law should be harmonized throughout Canada. My study in the second volume focusses on the successes and

failures of the various attempts to secure harmonization of Canadian personal property security law, and compares the Canadian record to that of the United States. It points out that Canadians have failed to accomplish in the context of twelve jurisdictions what the Americans have accomplished in the context of fifty, and he offers an explanation for this disparity in accomplishment between the two countries.

There is persuasive evidence that interjurisdictional cooperation and coordination will be a sine qua non if Canada is to maintain or improve its current position in an increasingly competitive international economic environment. It is argued that fragmented policy making weakens the Canadian economy and prevents the realization of its potential. However, effective harmonization measures entail costs: they are inimical to the processes of democratic lawmaking, they lead to loss of local control, and they enhance the powers of bureaucracies. Canadians must therefore identify the mix of effective local control and interjurisdictional cooperation that will be most appropriate for the future. The studies contained in these two volumes highlight the factors involved in this important decision.

RONALD C.C. CUMING

ACKNOWLEDGMENTS

The procedure that was generally followed by the participants in the section titled Harmonization of Law in Canada was to invite outside experts to attend research group meetings in order to provide reaction to early drafts of research papers as well as guidance in preparation of later drafts. Those who accepted the invitation and who attended the meetings made important contributions to the studies published in this and the companion volume.

Mr. William Hurlburt Q.C., Chairman of the Institute of Law Research and Reform of Alberta, made available to the participants counsel based on his extensive experience as a leading law reformer in Canada. The searching questions and insightful suggestions contained in his written observations were of particular value in the preparation of the Coordinator's overview.

The extensive experience of Mr. H. Allan Leal Q.C., Vice Chairman of the Ontario Law Reform Commission, as a leading member of the Uniform Law Conference of Canada for many years was of obvious value to a study of harmonization of law in Canada.

Three other contributors provided much appreciated guidance in specific areas: Dr. Hugh Stevenson, in the area of education law; Professor William Tetley Q.C., in the area of insurance law, and Professor Ed Belobaba in the area of consumer protection law.

Harmonization of Law in Canada is only part of a much larger undertaking. As Director of the Law and Constitutional Issues Program, Dr. Ivan Bernier had the task of ensuring that the work of this section was integrated with that of the other sections. He discharged this task with skill and understanding. His unflagging optimism and good humour were instrumental in assisting his research coordinators through some difficult times.

Very complex logistics are associated with bringing several research papers through the many steps between first drafts and published studies. Without the constant guidance and assistance of Mr. Jacques J.M. Shore, Research Program Administrator and Executive Assistant to the Director of Research, the task would have been much more difficult if not totally unmanageable.

I am indebted as well to the members of the editorial department (who did not always accept my prose and punctuation) and to the secretarial and administrative staff. Every request for assistance was met with a cheerful and prompt response.

R.C.

Harmonization of Law in Canada: An Overview

Ronald C.C. Cuming

The Scope of the Study

Any study of "harmonization of legislation" must address initially the question of scope. It might be argued that it is not particularly useful to confine the inquiry to legislation in the form of legislative acts of the parliament of Canada and the legislatures of the provinces, since legislation is nothing more than a vehicle for the implementation of social or economic policies that legislators desire for their jurisdictions. Further, legislation is only a part of the picture. Policies that can be disruptive to the political and economic integration of Canada need not always be embodied in legislation. For example, some economists claim that procurement policies of provincial or municipal governments can be a significant barrier to the free movement of economic factors throughout the country. Yet, rarely are these policies embodied in legislation.

The essential validity of this argument is obvious. However, policy harmonization is a very broad and multifaceted subject, one which involves many aspects of social, political and economic life of Canada. It is clear that the mandate of this section of the Royal Commission's research program is not broad enough to permit this type of study.

One important feature of the mandate is that it contemplates a legal study, not an economic or sociological study of harmonization. As a result, this study undertakes to separate questions associated with the desirability or otherwise of harmonization of policies from the design of mechanisms for securing harmonization once the decision has been made that harmonization is a desired goal in a particular area of governmental activity. While there is a range of existing and potential harmonization mechanisms available, each aspect of government policy does not have its own particular mechanism. The focus of this overview is how to harmonize, and not what is to be harmonized.

The legal nature of the study has conditioned its structure in another way. The spectrum of harmonization mechanisms is quite broad, encompassing mechanisms ranging from those that are totally informal to those that involve elaborate structures. There are those which are designed to affect statutory law, administrative rules and structures incidental to statutory laws, and those which are designed to secure harmonization of

policies which do not have a legislative base. This study has been designed to focus on those harmonization mechanisms, whether informal or elaborate, that are designed to secure harmonization of policies that require some legal infrastructure for their implementation in the form of non-statutory law, legislation, regulations or administrative rules. The additional factors involved when policy implementation requires change in the law create special problems. The purpose of this study is to examine these factors, to assess the adequacy of existing mechanisms and, where necessary, to propose new mechanisms designed to facilitate harmonization of law-based government policy.

The study has been structured in such a way as to examine harmonization of law in the context of five specific policy areas that were the subjects of separate papers in this collection: consumer protection, education, securities regulation, insurance and personal property security. While it cannot be claimed that these areas are representative of all government policy making or involve all existing or potential mechanisms for harmonization of law, they do provide a context within which the more important and more prevalent issues associated generally with harmonization of law can be examined. Many of the conclusions set out in this overview have application to a wide range of governmental activity which, over the next few years, may well be the focus of harmonization efforts.

Harmonization: What Is It?

The Uniform Law Conference of Canada, the official government-sponsored organization established to facilitate uniformity of provincial legislation, prepares and publishes "uniform acts" for adoption by the provinces and territories. The basic assumption underlying the efforts of the Conference is that all provinces will enact uniform acts as published. If the assumption reflected reality, identical legislation dealing with a wide range of subject matter would exist in all provinces and territories. However, the goal of the Conference has not yet been fully realized in the context of any area of the law, notwithstanding the fact that it has published uniform acts dealing with at least sixty different areas of law. To the extent that the Conference can claim success, what is involved is partial uniformity of legislation among some jurisdictions. Even in the unlikely event that all jurisdictions were to enact a uniform act as published, uniformity would soon be destroyed by amendments made after the legislation was in force. Indeed, the Uniform Law Conference amends its own acts, thus producing dissimilarity between jurisdictions which retain the unamended form of an act and those which adopt the act in its amended form.

The experience of the Uniform Law Conference of Canada establishes that complete uniformity is an unattainable goal in Canada. Indeed, it is likely unattainable in any federation which has more than a very few jurisdictions. Perhaps the most successful undertaking to secure uniform law was that of the American National Conference of Commissioners on Uniform State Law and the American Law Institute, which resulted in the Uniform Commercial Code. The Code was ultimately enacted in almost all jurisdictions in the United States, but notwithstanding the creation of machinery to discourage deviation, uniformity has not been achieved. In some cases, state legislatures decided that local conditions required provisions different from those set out in the Uniform Commercial Code, and in others, subsequent amendments to the Code promulgated by its sponsors were not adopted by states which had enacted the original version of it.

Pragmatism dictates that, at best, something considerably less than legislative uniformity can be expected even with respect to matters concerning which there is universal agreement that consistent treatment throughout the country is required. This is one of the reasons why, in this paper, the term harmonization is used rather than the term uniformity. Harmonization eschews any suggestion that what is involved in all cases is identical or even substantially identical legislation in all jurisdictions. Rather, it describes a flexible concept embodying a range of measures that may vary according to the context in which an issue is treated. In one context, it may mean that the relevant law of the jurisdictions involved is characterized by a high degree of similarity in basic principles but not detailed provisions. The result is that a person familiar with the law in one jurisdiction can easily understand the law of another and adjust to it without difficulty. A simple example of this type of harmonization involves matrimonial property laws which will inevitably differ in detail, but which may embody a consistent underlying approach, such as community of property or deferred sharing. In another context, harmonization may involve a high degree of similarity of detailed regulatory requirements among jurisdictions so that persons who are required to comply with the laws of several jurisdictions are able to do so without undue trouble and expense. For example, a strong argument can be made that, in order to facilitate the movement of capital and to permit maximum efficiency, laws dealing with lending institutions, personal property security and investment securities should involve a high degree of detailed harmonization. In yet other contexts harmonization may not require legislative similarity, but legislative complementarity. This would be the case where harmonization of federal and provincial legislation is involved. For example, it may be argued that complementarity is impor-

tant in such areas as consumer protection law where the two levels of government have concurrent jurisdiction and each has enacted legislation. Finally, it must be recognized that, in some situations, effective harmonization may require more than legislative harmonization, and in others, no legislative harmonization is required at all. Further, in some situations legislative harmonization may be inadequate without a high degree of coordination among government agencies charged with administration of the legislation. For example, all jurisdictions may have very similar legislation regulating trade practices; however, since this type of legislation involves a great deal of involvement on the part of administrative officials, legislation may be applied very differently in different jurisdictions unless efforts to secure administrative harmonization are undertaken and are successful. In other situations, the presence of administrative coordination may reduce or eliminate the need for harmonization of the empowering legislation. For example, statutes that provide for the licensing of certain trades and professions frequently give a large measure of discretion to licensing authorities which, if exercised in a coordinated manner, could produce de facto harmonization among the cooperating jurisdictions. In the area of securities regulation, administrative harmonization has developed to a high level of sophistication without uniform provincial legislation.

The term harmonization has been chosen over uniformity for use in this paper for another reason. The term embodies the element of coordination, something which is not necessarily associated with uniformity. Uniformity of legislation may be a barrier to realization of national goals. For example, if it is assumed that freedom of interprovincial commercial activity is a national goal, uniformity may prevent it from being realized if each province imposes uniform restrictions on the mobility of goods, labour or services or adopts uniform policies of preferential treatment for locally sourced goods or services in provincial or local government procurement contracts. Harmonization of provincial legislation to the extent that it involves an element of coordination or cooperation is more likely to lead to the mutual reduction or abolition of barriers to the movement of economic factors.

It should not be assumed that harmonization measures will necessarily lead to more law or the proliferation of bureaucratic structures. Harmonization may occur through the repeal of law in one or more jurisdictions with the result that a particular area of activity is free from regulation in every jurisdiction.

As it is used in this overview, the term harmonization cannot be defined. Its connotations are highly relative. The nature and level of harmonization required in a particular situation will depend entirely upon the specific circumstances of that situation. In rare cases, harmonization may come close to uniformity but, for the most part, realities of the Canadian federation dictate otherwise.

The Role of Harmonization in Canada

Measures directed toward securing harmonization of the laws of jurisdictions in a federal state are inherently hostile to the principles that underlie a federal system of government. Unfettered freedom on the part of each jurisdiction of the federation to deal with matters within its legislative competence is the hallmark or raison d'être of a federal form of governmental organization. The choice of a federal structure is conclusive evidence of the desire, if not the need, that certain aspects of social and commercial conduct which are subject to legal regulation be differently regulated in different jurisdictions within the federation. Indeed, the very fact that a federal structure provides for a central government with constitutional authority to enact legislation which is effective throughout the country, theoretically at least, removes any basis for argument that there is a need for harmonization of provincial law. Matters which, because of overriding national interest, require uniform treatment throughout the country are placed within the legislative competence of the federal parliament. All matters left to provincial jurisdiction are, by definition, matters that can be subject to diverse legal treatments without damage to the national interest.

Changing conditions may dictate that the division of legislative power initially selected be periodically altered. The Constitution may include mechanisms through which legislative jurisdiction can be ceded to the federal parliament by provincial legislatures or vice versa as circumstances warrant. Whatever method is employed, the result is that the national interest is protected where required without the loss of provincial legislative competence in matters of a local nature.

There is abundant evidence supporting the conclusion that this theoretical model does not reflect the realities of a federal state such as Canada. Matters of national importance are not always found within the legislative competence of the national legislature. A rational re-ordering of legislative jurisdiction rarely occurs notwithstanding the numerous proposals for constitutional change which continually are being put forward by politicians, economists, business organizations and others. A much more complex model is required — one which recognizes the need for provincial involvement in the pursuit of national interests through self-imposed limits on the freedom to enact laws substantially dissimilar to laws of other jurisdictions.

The drafters of the *Constitution Act, 1867* made an allocation of legislative jurisdiction between the federal parliament and the provincial legislatures which, presumably, was appropriate for the circumstances prevailing in Canada in the 1860s. However, even then, harmonization of the laws of the common law provinces was considered very important. The 33rd clause of the 29th resolution adopted at the Quebec Conference in 1864 provided that the "General Parliament" would make laws for

"rendering uniform all or any of the laws relating to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island and rendering uniform the procedure of all or any of the Courts in these Provinces." However, the uniform law was not to be enforced in a province until "sanctioned by the Legislature thereof." In a speech to the Legislative Assembly of Canada, John A. Macdonald stated:

> The 33rd provision is of very great importance to the future well-being of these colonies. . . . The great principles which govern the laws of all the provinces, with the exception of Lower Canada, are the same although there may be a divergence in details; and it is gratifying to find, on the part of the lower provinces, a general desire to join together with Upper Canada in this matter, and to procure, as soon as possible, an assimilation of the statutory laws, and the procedure in the courts, of all these provinces. . . . Although, therefore, a legislative union was found to be almost impracticable, it was understood so far as we could influence the future, that the first act of the Confederate Government should be to procure an assimilation of the statutory law of all those provinces which has, as its root and foundation, the common law of England. (Parliamentary Debates on Confederation, 3rd Sess., 8th Prov. Parlt. of Can. 1865, p. 41)

Section 94 of the *Constitution Act, 1867* adopted in substance the Quebec Conference formulation but added to it in an enhanced form a new feature proposed at the London conference. Section 94 not only gives to the parliament of Canada the power to "make Provision for the Uniformity of all or any of the Laws relating to Property and Civil Rights in Ontario, Nova Scotia and New Brunswick and of the Procedure of all or any of the Courts in those Provinces" but goes on to provide that "from and after the passing of any Act in that Behalf, the Power of the Parliament of Canada to make laws in relation to any Matters comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted . . .." The provinces retained the power to prevent federal legislation from having effect by refusal to adopt it.

The modification to the Quebec Resolution proved to be too much of a good thing. It is clear that the technique for securing uniformity embodied in section 94 of the *Constitution Act, 1867* was nothing short of an irrevocable surrender of jurisdiction by provincial legislatures to the federal parliament. Provincial legislators could be forgiven for being less than enthusiastic about cooperation with the federal parliament in the rationalization of legislative jurisdiction in the national interest. Provincial jurisdiction once surrendered could not be regained, and no provision was made for the transfer of any aspect of federal jurisdiction to the provinces as circumstances warranted it. Speaking in the House of Commons in 1902, Sir Charles Fitzpatrick, the then minister of justice and later Chief Justice of Canada accurately characterized the effect of section 94 when he said:

> Therefore, I think that the practical way to proceed in this matter would be to ask the local legislatures how soon they are going to be disposed to commit suicide, because the effect of this legislation would be to deprive them of power to legislate with respect to those subjects which warrant their continued existence. If you take from out of the jurisdiction of the local legislatures the laws affecting property and civil rights, then you have taken from them all those subjects which make their continued existence justifiable. (*House of Commons Debates,* Canada, 1902, Vol. 56, p. 1097)

It is not surprising that section 94 was stillborn and has had significance only as a historic footnote.

It is a matter of speculation whether or not provincial legislators would have been more willing to surrender areas of jurisdiction to the federal parliament if reciprocity were possible or if a surrender were not irrevocable. It is not certain that any constitutional scheme, however well drafted, under which legislative jurisdiction is re-ordered would have had much appeal as a method for securing uniformity of law in Canada. The *Constitution Act, 1867* has been amended three times so as to cede to the parliament of Canada exclusive or concurrent jurisdiction over specific aspects of property and civil rights which were originally given to provincial legislatures. This was done with the unanimous consent of provincial legislators; however, in no case was the transfer of jurisdiction made simply because of perceived need to secure uniformity of the law pertaining to the specific areas of jurisdiction involved. Amendments to the *Constitution Act, 1867* giving the federal parliament jurisdiction over unemployment insurance and old-age pensions were induced by the general recognition that the superior federal taxing power placed the federal parliament in a much better position than provincial legislatures to establish and support unemployment insurance and old-age pension schemes. In the case of old-age pensions and supplementary benefits, federal law may not affect provincial legislation dealing with these matters.

Canadian constitutional history clearly demonstrates that the need to have national solutions to problems of national concern cannot be adequately met through constitutional amendment or the use of constitutional mechanisms under which legislative jurisdiction is ceded to the federal parliament. The constitutional division of legislative power in Canada, while not immutable, has been very difficult to alter. There is no reason to think that, given the restrictiveness of the amending formula added to the *Constitution Act* in 1981, this will change in the foreseeable future unless some crisis produces a change in attitude on the part of provincial legislators. In any event, it is most unlikely that perceived or demonstrated need for harmonized legislation throughout the country will, by itself, produce this change in attitude. Ingrained aversion to loss of legislative jurisdiction is such that provincial legislators are much more likely to pursue other methods to secure harmonized or uniform law

when the necessity for it is established. This is demonstrable in the context of legislative regulation of the insurance and securities markets in Canada. In both cases, the need for standardized nation-wide regulation has been met in large part through interjurisdictional cooperation and coordination of legislative measures.

Nor can it be assumed that the Supreme Court will interpret the *Constitution Act, 1867* in such a way as to insure that legislative jurisdiction over matters of national concern is found to reside with the federal parliament. While there is some recent evidence that the Court is willing to pay greater attention to the effect of its decisions on the ability of Canada to deal with matters of national concern, there is no basis for the conclusion that the Court has taken upon itself the task of re-interpreting the *Constitution Act, 1867* so as to guarantee that result.

It is clear, therefore, that interjurisdictional harmonization of law will continue to be an aspect of nation building in Canada. In situations where the national interest requires uniform or coordinated legislative approaches to problems, mechanisms and institutions designed to secure interjurisdictional harmonization of legislation must be the primary focus of attention. Resort to constitutional change so as to permit legislative action by the federal parliament must be viewed as a remote last resort. If it can be demonstrated that the situations in which interjurisdictional harmonization of law is required are numerous and diverse, it will be important to the future development of Canada that mechanisms exist through which harmonization can be secured.

Even if constitutional change designed to re-order legislative jurisdiction occurs with greater frequency in the future than it has since Confederation, the need for mechanisms to secure interjurisdictional harmonization will not disappear. Experience in all mature democratic federations demonstrates that it is virtually impossible to design a constitution in which the legislative jurisdiction of the various levels of government is formulated in such a way as to prevent concurrency. Efforts to secure "watertight" compartments of legislative jurisdiction inevitably fail. Quite apart from the inadequacy of language and the impossibility of dealing with all eventualities in a written constitution, the fact that the drafters and the interpreters of a constitutional document are two different groups of people almost ensures that differences will develop between constitutional design and its application in practice. Further, the skill of constitutional drafters is not such as to design a structure under which the exercise of legislative power in one province can be guaranteed not to have effect on other provinces.

Support for measures designed to secure harmonization of aspects of provincial law in Canada is not a recent phenomenon. Shortly after the beginning of this century, public pleas for the recognition of the importance of harmonization of provincial law were made by leaders of the Canadian legal profession and members of the judiciary. As a result, the

fledgling Canadian Bar Association at its first annual meeting held in 1915 established legislative committees to examine various areas of the law with a view to securing "uniformity" among the provinces of Canada. The spirit of the undertaking was summarized by Eugene Lafleur K.C.: "Shall we by remaining in jealous isolation encourage the aimless and inevitable differentiation of our legal systems, or shall we not rather, insofar as our special circumstances will permit, fall into line with the movement in all great nations toward the goal which a great Belgian jurist called 'the universality of the law'." (*Report* of Canadian Bar Association 1915, p. 30.)

The efforts of the Canadian Bar Association led to the decision that a permanent organization be established with the objective of securing uniformity of provincial legislation throughout Canada where necessary and practicable. As a result the Conference of Commissioners on Uniformity of Laws throughout Canada (later to be known as the Conference of Commissioners on Uniformity of Legislation in Canada and still later as the Uniform Law Conference of Canada) was formed in 1918 by provincial governments. This organization has continued to function from its inception to the present. Although it has remained the officially recognized organization for securing uniformity of legislation in Canada, it has not had a monopoly. Other ad hoc undertakings designed to secure harmonization have appeared from time to time throughout Canadian history.

It would not be inaccurate to conclude that Canadians recognize, at least in a general context, the need for interjurisdictional harmonization of law and are prepared to support organizations, official and unofficial, established for the purposes of securing it. This is not to say that harmonization efforts will always be totally or even substantially successful. What is clear is that the goal of harmonization, at least in theory, remains significant to Canadians. Proposals designed to move facets of Canadian law closer toward that goal will not be without support in the future.

Harmonization of Law: An Issue not Peculiar to Canada

The need for interjurisdictional harmonization of law is not a peculiarly Canadian phenomenon. It has been recognized as being an important aspect of nation building in other federal countries such as Australia and the United States; it has provided the raison d'être of international organizations such as the International Institute for the Unification of Private Law (UNIDROIT), the Council of Europe, the Hague Conference on Private International Law, and agencies of the United Nations such as the United Nations Commission on International Trade Law; and it underlies the elaborate treaty provisions and administrative structures of the European Economic Community. Canadians are not alone in their search for approaches and mechanisms through which legal harmoniza-

tion can be secured. Consequently, lessons learned and experiences gained elsewhere should not be ignored.

This fact has not escaped the attention of Canadians who have worked for an increased level of legal harmonization in Canada. For example, the Uniform Law Conference of Canada was patterned on the American National Conference of Commissioners on Uniform State Law. The Canadian Bar Association's Committee on a Model Uniform Personal Property Security Act was heavily influenced by developments in the United States concerning the harmonization of state personal property security law.

The conclusions in this paper draw on experience acquired elsewhere, particularly in the United States and Australia, the two federal jurisdictions which have legal traditions similar to those of Canada. Care, however, has been taken to avoid the simplistic assumption that what works or does not work in the context of another country or in the context of a group of countries will be a success or failure in Canada. The cultural homogeneity of Australia and the population concentration, industrialization and economic integration of the United States are not found in Canada. On the other hand, the cultural and legal diversity that prevails in Canada might suggest that mechanisms for securing harmonization of law in the European Economic Community might be applicable in Canada. If a group of states, some of which were at war with each other just forty years ago, and each of which has its own social, economic, legal and political traditions and infrastructures can succeed in achieving a high level of legislative harmonization of important aspects of commercial law, is there not merit in considering the applicability to Canada of harmonization approaches used in the Community? The answer to this question is a qualified "yes." A few important factors must be kept in mind, however. The European Economic Community is a group of jurisdictions which have formally agreed by treaty to pursue specific common goals. They have accepted formal mechanisms and particular measures which have been designed to reach these goals. A central authority has been given power to make and enforce policy and administrative decisions. When one compares this structure with the relationship between Canadian jurisdictions, significant differences are revealed. No formal agreement exists among Canadian jurisdictions that general harmonization of law or harmonization of any specific area of the law is to be pursued. Each proposal for harmonization of law is separately assessed on its merits and in the light of conditions prevailing at the time the proposal is put forward. Provinces are not legally constrained in any way from acting entirely on their own in the exercise of legislative jurisdiction which they have under the *Constitution Act, 1867*. No constitutionally mandated central authority exists which can implement and maintain legal harmonization among Canadian jurisdictions. The result is that continuing or

frequently renewed consensus is much more important to harmonization in Canada than it is in the European Economic Community.

The experience of the European Economic Community, however, is not without value to Canada. It demonstrates the advantages in having some form of politically significant organization which has responsibility for selecting areas in which harmonization is to be pursued. The Community's practice of using policy directives rather than models for uniform legislation is a method of securing harmonization among jurisdictions with very different systems that may well be applied in Canada where uniformity of legislation among jurisdictions has been so difficult to achieve.

Federal-Provincial Harmonization

The theoretical model described earlier envisages a constitution providing for "watertight" compartments of legislative jurisdiction with the federal parliament having jurisdiction over all matters which, in the national interest, require uniform legislative treatment throughout the country, with provincial legislatures having legislative jurisdiction over matters of a local nature. An underlying assumption of the model is that harmonization of federal with provincial legislation is unnecessary since each level of government operates within its own clearly defined sphere.

The reality of the current Canadian constitutional structure is otherwise. Many matters which might be seen as being in the national interest and which for that reason require similar legislative treatment throughout the country fall partially within federal legislative jurisdiction and partially within provincial legislative jurisdiction. While constitutional change is certain to occur in the coming years, it is most unlikely that instances of divided jurisdiction over matters of national interest will be eliminated. This being the case, it follows that institutions and mechanisms designed to facilitate interjurisdictional harmonization must have the ability to accommodate efforts to secure harmonization of federal and provincial legislation. In recent years, some progress has been made, but the structures for securing federal-provincial harmonization of law are still experimental and fragile. A possible exception is the Criminal Law Section of the Uniform Law Conference, which has provided a vehicle for securing harmonization of criminal law administration in Canada.

Interjurisdictional harmonization of provincial law and interjurisdictional harmonization of federal and provincial law are necessarily connected. Harmonization of federal with provincial law is possible in some contexts only when provincial laws are in harmony with each other. The relatively poor record of the Uniform Law Conference of Canada and other organizations designed primarily to foster harmonization of provincial law may explain the lack of enthusiasm for greater federal-provincial

harmonization displayed over the years by federal legislators. It may not be enough, however, for federal legislators to sit back and wait until provincial legislators come forward with a provincial package which then can be harmonized with federal legislation. Sophisticated federal leadership may be required if significant levels of harmonization are to be achieved in areas of shared jurisdiction.

Some of the consequences which flow from a failure to have effective harmonization machinery and effective leadership can be seen in the events surrounding the decision of the federal government in the mid-1970s to increase dramatically federal legislative presence in the regulation of consumer credit. Consumer credit law is one area which has aspects falling within the legislative jurisdiction of both the federal parliament and the provincial legislatures. The federal Department of Consumer and Corporate Affairs decided to proceed with legislation which focussed on a broad range of issues arising in the context of the Canadian consumer credit market. In 1976, first reading was given to the Borrowers and Depositors Protection Act Bill (BDPA). The bill, which was never enacted, was attacked by the provinces, the financing industry and consumer groups. Senate and House of Commons committees studied it, and reformulations were offered by the Department of Consumer and Corporate Affairs. Some of the many criticisms of the proposed legislation were that it would be constitutionally invalid, it overlapped or conflicted with provincial legislation and its development had not involved consultation with the provinces. These criticisms must be assessed in the light of two important factors. The first is that, during this period, consumer protection was a politically popular issue throughout Canada and provincial legislators were anxious to demonstrate their concern for consumers through the enactment of new provincial consumer protection measures. Further, until the introduction of the BDPA Bill, the federal parliament had remained largely inactive, but provincial legislatures had built up considerable experience with legislation and administration in this field. The second is that there existed at the time a formal structure for consultation in the form of annual meetings of consumer affairs ministers which began in 1969.

When consultation with the provinces was undertaken, it was perceived by the provinces as too little, too late — a token effort in which the provinces were presented with a fait accompli by federal officials. Provincial opposition was expressed at the 1975 federal-provincial conference of ministers of consumer affairs and at subsequent conferences and meetings. The picture was made more chaotic by the admission of the provincial governments that while uniformity of consumer credit law was desirable as a goal, there is no agreement among the provinces as to how the goal was to be reached. Beginning in 1976, federal officials decided to shift from confrontational tactics to those involving accommodation and leadership. At the suggestion of the provinces a permanent federal-

provincial task force on consumer credit was formed in 1977. However, all this came too late for the BDPA Bill or for any major initiatives on the part of the federal parliament in the development of consumer credit law on a national scale. The public interest in consumer credit law by this time had been replaced with concerns over inflation and unemployment.

While the failure on the part of the federal government to secure a greater level of rationalization of consumer credit law may have little or no significance to the further development of Canada, and may be viewed by some as a positive outcome, repetition of this pattern in the context of other matters of national concern may well prove destructive.

The Case Against Harmonization

Uniformity of provincial law has, from the earliest days of Canada's existence, been proclaimed by some as not only necessary in a few situations, but desirable over a broad spectrum. However, substantial harmonization of law, let alone uniformity, has not characterized Canada's legislative development over the first 117 years of its existence. Canadians have displayed a great reluctance to surrender the perceived benefits that a federal form of constitution affords. The greater the degree of harmonization achieved in a federal state, the less federal the state becomes. The ultimate stage of harmonization is uniformity; if all laws of all provinces were uniform, the result would be two central governments, the parliament of Canada and the organization or organizations which prepared uniform acts.

It is, perhaps, not too difficult to identify the reasons why general harmonization of law has had limited support in a federation like Canada. The federal structure recognizes the inherent superiority of local legislatures as a source of law dealing with a wide range of matters and the superiority of local administration of those laws. Democratically elected local legislators are likely to reflect local attitudes and are able to respond rapidly to demand for change in law. Laws of small political units can be focussed, and therefore be more effective. Because of their size, smaller bureaucratic structures can be efficient and responsive.

A common feature of harmonization measures is the loss of freedom of action on the part of the participants. While harmonization does not involve an irrevocable surrender of legislative jurisdiction or the power to enact legislation, it necessarily involves constraint. Legislators who have undertaken to act in harmony with other legislators, whether provincial or federal, have an additional factor to take into consideration when local conditions warrant legislative action: to what extent will new legislation create disharmony? In some cases, legislators will be forced to choose between local needs and national harmonization. Even where local and national interests coincide, legislators must choose between acting immediately to deal with a situation and delaying action pending intergovern-

mental consensus as to what measures should be taken on a national scale. If consensus is difficult to achieve, delay will occur and damage may result.

An important negative aspect of the constraint which interjurisdictional harmonization places on legislators is the extent to which it may discourage legal and social experimentation. Some of the most important social developments in Canadian society which have occurred since World War II in the areas of health care, education and human rights, just to name a few, were initiated in a single province at a time when legislators in other provinces and federal legislators were unprepared to act. The federal structure of the country and the desire on the part of some provincial legislators to innovate resulted in "demonstration projects" which in some important situations paved the way for nation-wide programs. There is reason to believe that the legal and social development of Canada would have been much slower if all significant changes had to have been acceptable to all Canadian legislatures. In those few cases where the social experiment demonstrated the undesirability of proceeding further, the fact that the experiment was being carried out in one jurisdiction and not throughout the country has meant that the costs involved have been minimized.

There is another aspect of an interjurisdictional harmonization which cannot be overlooked. Legislative models and uniform acts are, almost of necessity, the handiwork of people who are not directly responsible to the public. They are prepared by civil servants or consultants drawn from the jurisdictions involved in the harmonization efforts. In practice, it is impossible to have even a substantial number of legislators involved in the preparation of models that would form the basis for harmonization. While legislators ultimately have a veto in the sense that they can refuse to enact a proffered harmonization model in their jurisdictions, they can have little direct influence on the content of such a model. The consequences of political structures which are elitist and anti-democratic are obvious. Citizens of a jurisdiction are likely to view the law with more respect if they feel that their views have been considered in the lawmaking process. To the extent that harmonization prevents this from occurring, it can be viewed as being destructive.

In addition to the fact that the organizations from which proposals for harmonization emanate are likely to be elitist in character is the fact that all participants in the organizations are not likely to have equal power. Indeed, some jurisdictions may feel that they do not have the resources to permit full and effective participation in the organizations. Even when all jurisdictions are able to participate in national harmonization efforts, the small, less powerful jurisdictions are likely to have, or will be perceived as having, less ability to influence the form of harmonization proposals.

This may well induce the conclusion on the part of the residents of these jurisdictions that the benefits of harmonization accrue primarily to the residents of larger, more powerful jurisdictions.

It is clear that effective, widespread interjurisdictional harmonization of law would result in the loss of many important benefits which a federal form of constitutional structure makes possible. In an ideal, theoretical context, harmonization would be rejected. However, in the practical world it is a necessary evil since it offers benefits which are crucial to the further development of Canada as a nation. While it is important for Canada to have machinery designed to facilitate interjurisdictional legal harmonization, this machinery should be designed to minimize the objectionable aspects of the harmonization process and should be invoked only when it can be demonstrated that harmonization is necessary. Efforts to secure interjurisdictional harmonization must be focussed on matters which are of overriding national importance and which, as a result, must be dealt with in a coordinated manner. Harmonization for its own sake will not only receive little public support, but will bring the harmonization process into disrepute and prevent it from being effective in situations where it is needed. For this reason and others that will be discussed later, the Uniform Law Conference of Canada has been much less effective than it might otherwise have been.

There is a negative aspect of interprovincial harmonization which is a by-product of its apparent success. The existence of harmonization mechanisms and measures which are effective with respect to some matters may mask the need for constitutional change to deal with other matters which cannot be effectively dealt with through cooperative efforts of all provincial governments. As noted earlier in this overview, it seems likely that it will be difficult in the foreseeable future to secure constitutional change in Canada which has the effect of transferring legislative jurisdiction from provincial legislators to the federal parliament. If change does occur, it will most likely be induced by public demand for greater federal involvement or complete federal control over an area of subject matter. This demand will be a direct consequence of a public perception that a fragmented approach is completely inadequate. However, this perception may be slow to develop when some of the more obvious problems which arise in a particular area of law and which require legislative treatment are dealt with through coordinated provincial action. The very fact that some of the problems involved can be eliminated by joint action may lead to the unwarranted conclusion that all problems in the area can be treated in the same way. This may not in fact be the case.

An example of this can perhaps be found in the area of securities market regulation in Canada. In a study prepared for this research section, Professor Anisman reached the conclusion that, notwithstanding

a large measure of cooperative action on the part of provincial legislators and securities administrators which has resulted in some notable successes in achieving coordination of aspects of the Canadian securities markets, federal legislative jurisdiction with concomitant federal administrative control is required. His conclusion is that, however conscientious provincial legislators and administrators may be in their attempts to reduce the impact of interjurisdictional differences of law and policy, there is little prospect of a significant diminution in regulatory diversity and its consequences. Diversity, while acceptable in most areas of law, is a source of major concern for securities administration because a security is highly mobile and can be dealt with in any jurisdiction without regard to the locus of the issuer. Particularly troublesome are the difficulties encountered when a provincial securities commission seeks to enforce rules designed to protect investors. Cease-trading orders are effective only within the province where they are issued. Their use in one province against an issuer for actions of the issuer occurring in another province is questionable in that it involves an attempt to give extraterritorial effect to the laws of that province. In addition it can be counterproductive in that it affects the rights of residents of the province to acquire locally the securities of the issuer under circumstances where the laws of the province have not been violated. Theoretically, at least, the problems of enforcement could be reduced through an agreement among all commissions to enforce the laws of each other's jurisdiction. This can be done in some circumstances, but it is unrealistic to assume that it will be done on a universal basis.

There are other problems, however, which no amount of coordinated activity, however expeditious and uniformly carried out, can resolve. Securities markets are increasingly international in scope. The growth of Euromarket trading, the establishment of international relationships for the exchange of traded options, and a recent announcement of a formal arrangement by the two leading Canadian exchanges to permit electronic linkage with exchanges in the United States are manifestations of this trend. The ability of the provinces to address problems which arise in this context is constitutionally and practically much too limited to be either effective or efficient.

The partial success of the various efforts over the years to secure harmonized securities legislation, and the very considerable level of cooperation which exists among provincial securities commissions, have provided a large measure of needed protection for Canadians. However, changing conditions in securities markets in Canada have induced some Canadian experts to question the efficacy of continued use of a fragmented approach to their regulation. One of the difficulties in making a strong case for constitutional change is that on the whole harmonization of provincial securities law and regulatory measures has worked reasonably well.

The tendency of harmonization measures to mask the need for constitutional change presents a dilemma for Canadians. Harmonization of provincial law is pursued because needed constitutional change is difficult to secure. Yet, by reducing the intensity and visibility of the problems that are the result of an inappropriate allocation of legislative jurisdiction, harmonization measures impede efforts to obtain needed constitutional change and, as a result, in the long run may exacerbate rather than ameliorate those problems. A solution to the dilemma is not readily apparent. It does not lie in choosing to reject harmonization of provincial law in the hope that the damage resulting from lack of coordinated approaches to problems of national concern will be so apparent and widespread as to induce public demand for constitutional change. Perhaps the most that can be expected is that any interjurisdictional undertaking to deal with national problems in Canada should first address the question as to whether or not harmonization of provincial law can produce the desired results.

The Case for Harmonization

It is tempting to make the case for harmonization by pointing to the many political and economic advantages which, at least in theory, are associated with a unitary form of constitutional structure, and to suggest that these benefits could be realized within a federal structure through effective harmonization without destroying provincial autonomy. In effect, this approach suggests that Canadians can have it both ways: Canada can be a federation in which provinces have exclusive or concurrent legislative authority over a wide range of matters, but at the same time national goals and policies for those matters can be established through harmonization machinery. This approach denies reality; no amount of wishful thinking can reconcile opposites. In short, there is no point in pretending that all of the advantages of a confederation and a unitary state can be had at the same time.

The case for harmonization begins with the admission that harmonization is the enemy of autonomy and then proceeds to the assertion that from time to time circumstances will dictate the necessity or desirability of coordinated action among provinces or between provincial and federal governments. In some situations, loss of autonomy may be an acceptable price to pay for the advantages that harmonization offers.

The most obvious and most important situation in which Canadians must look for harmonization as a method of dealing with problems has been described briefly earlier in this overview. Not infrequently, provinces find themselves in the position of having legislative jurisdiction over matters which are not of a local nature and which require national treatment. Because of the many difficulties associated with constitutional change, not the least of which is the reluctance on the part of provincial

politicians to surrender legislative jurisdiction, constitutional power over these matters cannot easily be transferred to the federal parliament. The result is that a federal legislative solution is not available; a solution must come from or, at the very least, involve provincial legislators. Some form of harmonized approach is required.

A current example of such a situation lies in the area of international treaties affecting Canada. In the postwar era, with its greatly increased flow of international trade and investment, numerous efforts have been made to facilitate and simplify the legal aspects of international commerce through conclusion of multilateral conventions. Many of these conventions involve questions of commercial law otherwise falling within provincial jurisdiction. The challenge that faces federal and provincial governments is how to secure Canada's accession to such treaties and to ensure coordinated provincial action. The only explicit reference in the *Constitution Act, 1867* to international treaties appears in Section 132, and this was held by the Privy Council in the *International Labour Conventions* case to be limited to imperial treaties signed by the United Kingdom before Canada acquired its own international legal personality. The Privy Council also ruled that the federal government lacked constitutional authority to bind the provinces by treaty on subjects falling within provincial jurisdiction. Notwithstanding some recently expressed doubt about the limits on the federal treaty-making power, the federal government still treats the *International Labour Conventions* decision as binding and conscientiously follows a policy of not ratifying treaties in the international trade area that impinge upon provincial jurisdiction without the concurrence of the provinces. As a result, the ability of Canada to participate in international arrangements which would benefit Canada depends upon obtaining cooperation among the provinces. No formal mechanisms exist for securing this cooperation. Because of the difficulty in getting agreement, Canada has been forced to negotiate for the inclusion of "federal state" clauses in multilateral conventions. These clauses provide that if a contracting state has two or more territorial units which have their own rules in respect of treaty subject matter it may at the time of signature, ratification or accession to the treaty declare that the convention shall extend to all its territorial units or only to one or more of them. This has proved to be an unsatisfactory, but necessary, measure. The Uniform Law Conference has undertaken to facilitate agreement by proposing uniform legislation which can be used by provinces wishing to gain the benefits of an international convention. However, apart from this, it has not undertaken to urge uniform adoption of conventions.

The claims of a growing number of Canadian economists that significant economic benefits would accrue to Canadians from the reduction of barriers to interprovincial trade can no longer be dismissed out of hand. It is not inconceivable that national or international economic conditions may be such as to induce Canadians to insist that provincial governments

act in concert so as to facilitate full development of the economic potential of Canada and to increase the ability of Canadians to compete in world markets. Harmonization of those aspects of provincial law relating to important areas of economic activity within the provinces must be a central feature of measures taken to reduce interprovincial trade barriers.

The need for provincial action to deal with matters of national concern may arise in a slightly different context. In areas of concurrent federal-provincial jurisdiction, cooperation among provincial legislators may be the only way in which effective legislative action can be taken if the federal parliament is unable to discharge its role. This inability to act may be the product of parliamentary dysfunction, or failure on the part of the federal parliament to recognize the need for an adequate national approach to the problem. While not numerous, examples of provincial action to deal with perceived lapses in the exercise of federal legislative responsibility can be found in Canadian history. For example, between 1880 and 1919 there was no federal bankruptcy or insolvency legislation in Canada relating to individuals. The void which was created by federal inaction was in part filled by provincial legislation which, while not the product of cooperative efforts of all provinces, was nevertheless surprisingly harmonious throughout most of Canada. Almost all provinces, including Quebec, enacted legislation dealing with assignments and preferences and legislation providing for orderly distribution of debtors' assets among creditors.

A significant aspect of being a member of a community is the avoidance of inadvertent damage to other members of the community resulting from the pursuit of self-interest. A province may implement policies which have positive consequences for its residents, but which have unintended negative consequences for residents of other jurisdictions. To the extent that harmonization involves coordination, it can reduce the incidence of mutual injury among jurisdictions. In this context, harmonization may involve nothing more than the redesign of offending policies of a jurisdiction or the manner in which those policies are implemented so as to avoid or reduce potential for injury to other jurisdictions incidentally affected by them. Mechanisms designed to facilitate harmonization can serve as a forum within which interjurisdictional grievances of this kind can be managed.

The case for having effective harmonization machinery in Canada is supplemented but, of course, cannot be totally supported by pointing to the many incidental benefits which accrue from various forms of harmonized or coordinated provincial or federal action. Such action generally does not relate to matters of overriding national concern and need not involve all jurisdictions. The degree of restraint on the freedom of participating jurisdictions to act autonomously is not significant; however, the cumulative result of cooperative action over a wide range of

matters can be significant. For example, many areas of law and associated public administration are complex and extensive, and costly research should precede enactment of legislation or the creation of administrative structures. Even in buoyant economic times, provincial governments, particularly those which have a small tax base, complain about the lack of adequate resources to fund the necessary background research. As a result, needed reform is often not undertaken, or laws are enacted and administrative structures created without adequate research. Effective harmonization machinery could be designed to permit pooling of provincial resources, with the result that funds would be available to carry out research and to acquire expert advice when preparing legislation or designing administrative structures. On a more modest scale, harmonization machinery could be designed to provide a clearing-house function so as to make available to the provinces the benefits of research and expertise acquired by other provinces which have acted on their own in developing legislation or administrative systems.

This type of interprovincial cooperation is likely to result in a measure of legislative and administrative harmony among the provinces which would have incidental beneficial effects. For example, judicial interpretation of provincial legislation by a superior court of one province is of value in other jurisdictions which have legislation identical or substantially similar. There is no assurance that the courts in one province will necessarily adopt the legislative interpretations of courts of other provinces, but it is part of the legal tradition of courts in common law jurisdictions in Canada to give considerable weight to judgments of courts in other provinces. The result is a reduction in litigation and the more rapid development of the law of the jurisdictions involved. If the matter should be brought before the Supreme Court of Canada, the interpretation placed on the legislation by the Court de facto becomes the law in all jurisdictions with identical or substantially similar legislation.

The Special Position of Quebec

It is impossible to consider legal harmonization as an instrument of nation building in Canada without recognizing the special position of Quebec. While the differences between the civil law and the common law are frequently overstated, the fact remains that Quebec's legal traditions are different from those in the rest of Canada. The differences are reflected not only in the basic conceptual underpinnings of the Quebec Civil Code and Code of Civil Procedure, but also in the connection between law and cultural survival. The French-speaking population of Quebec, surrounded as it is by millions of English-speaking people who adopted or inherited the common law, has devoted over the years a great deal of energy to the preservation of its culture. The legal system of the province along with the French language are still considered as cornerstones of

that culture. As a result, the Quebec civil law is not viewed as merely an instrument for orderly regulation of social and commercial relations among its citizens, but also as a structure which helps to define and preserve the special characteristics of Quebec society. As such, law has been used as an important instrument to permit the survival of the unique culture of the province.

While attempts were made by some of the early leaders in the uniformity movement to gloss over the differences between the civil law and the common law, no amount of wishful thinking was able to change reality. Even the initial assurances given by the founders of the Uniform Law Conference, and often restated thereafter, that the goal of the organization was to be pursued "without trenching in the least on treaty rights and historic traditions" was not enough to remove the fear that involvement in the Conference's activities would be the initial step toward ultimate assimilation of Quebec law with that of the common law jurisdictions. It was not until 1942, 24 years after the organization was founded, that Quebec was officially represented at the Conference meetings. In 1949, the first Conference president from Quebec, Antoine Rivard K.C., took the occasion in his inaugural address to state that the position of Quebec at the Conference was to maintain the "entire integrity" of the Civil Code as this was "not only essential to our own existence as a race, but also to the complete unity of the Canadian Nation." Subsequent events demonstrate that this declaration of policy has seldom been violated.

Primarily because of the interested observer role which Quebec commissioners and delegates have occupied since joining the Conference, no significant amounts of energy or resources have been expended until recently in an attempt to bring Quebec into the mainstream of Conference activities. Uniform acts have been drafted according to English legislative practice whereby the legislator has to anticipate the interpretation that the courts will place on the statutory provisions. This approach does not accommodate the principle of Quebec law that the "loi écrite" constitutes the first and normal source of law. Many uniform acts explicitly or implicitly assume a common law milieu with the result that they are inappropriate for adoption in a civil law jurisdiction. As was pointed out by Louis-Philippe Pigeon, later a justice of the Supree Court, in an article published the same year that Quebec joined the Uniform Law Conference: "L'adoption des lois uniformes équivaut à l'introduction graduelle du droit commun anglais."

In recent years, greater effort has been directed toward involving Quebec commissioners and delegates in Conference activities. In 1978, facilities were acquired to provide instantaneous French-to-English and English-to-French translation of deliberations at section and plenary sessions of the Conference. A resolution adopted at the 1979 meeting of the legislative drafting section called for the translation of a selected group of uniform acts into French and recommended that where possible

draft uniform acts presented to the uniform law section be adopted in both English and French. This move initiated a practice which now appears to be firmly established under which most uniform acts are published in both languages.

While these measures have been constructive, it is not at all certain that they will have the effect of bridging the gap between two systems of law. It is one thing to have a statute designed for use in a common law jurisdiction promulgated both in French and English. This is becoming an increasingly widespread practice in Canada since three common law jurisdictions, New Brunswick, Ontario and Manitoba, are required by law or by political necessity to make statutes available in both official languages. On the other side of the coin, Quebec civil law has been available in English translation for many years. It is quite another thing to prepare legislation prescribing rules of law which must be applied in very different milieus. In effect, what must be attempted is an expression of legislative objectives and policy in two languages, French and English, and in two contexts often very different from each other.

Even in the unlikely event that this could be accomplished to everyone's satisfaction, the fundamental problem remains: Quebec's fear of legal and cultural assimilation. Many French-speaking residents in Quebec still feel that Quebec's cultural survival depends upon retention of its uniqueness, and that any dilution of that uniqueness is dangerous. Yet by definition, uniformity or harmonization of legislation in any form entails elimination or reduction of differences among the laws of jurisdictions.

The historic and political realities of Canada are such that the art of the possible rather than the art of perfection governs every aspect of activity, including harmonization of law. So long as the residents and political leaders of Quebec find it important to rely on the uniqueness of Quebec law as a bulwark against cultural invasion by the rest of Canada, accommodation must be made. The accommodation which Quebec must have differs only in degree, and not in principle, from the accommodation which, for other reasons, must be made for other regions of Canada.

While Canadians must be prepared to accept a higher degree of diversity between the laws of Quebec and the laws of common law jurisdictions than might exist between the laws of common law jurisdictions, there is some evidence to indicate that political and economic forces may facilitate or even dictate a higher level of compatibility of law throughout Canada, including Quebec, than currently exists. The size of the Quebec population, the geographic location of the province and the fact that its economy is closely integrated with the economies of other Canadian jurisdictions make it impossible to isolate the province from the remainder of the country. Economic and social isolation is no more an option for any one Canadian jurisdiction than it is an option for Canada as a nation. No group of jurisdictions, whether subdivisions of a nation or

sovereign states, can have integrated economies without influencing one another. While they are able to preserve their cultural uniqueness, the common interests that they have inevitably lead to a search for solutions to problems which prevent the maximization of benefits associated with those common interests. Not infrequently this search leads to common solutions. This is particularly the case where transborder commercial activity is involved.

Recent developments in some areas of Canadian commercial law exemplify the harmonization process. Business corporations legislation enacted by the federal parliament in 1975 has influenced significantly legislation not only in Alberta, Saskatchewan, Manitoba, New Brunswick and Ontario, but also in Quebec. Bureaucratic cooperation among provincial agencies involving regulation of insurance and securities marketing includes Quebec. Experts from Quebec played an important role in developing model legislation designed to establish a central registry for security interests in aircraft. The 1977 report prepared by the Civil Code Revision Office recommended that the Civil Code be amended to include a system for creation and perfection of security interests that is conceptually and functionally very similar to the personal property security systems existing in four common provinces and all but one state of the United States. The report of the committee on the law of security on property on which the Civil Code Revision Office recommendations are based concluded that "any reform of the law on securities on movables (in Quebec) must take into account both Article 9 of the U.C.C. and the Canadian provinces' Personal Property Security Acts so that new rules established to govern real security on movable property may be consistent with the North American system and general business practice."

Interjurisdictional harmonization of law need not be a threat to Quebec. Because it necessarily involves voluntary participation by jurisdictions and because harmonization need not lead to uniformity, Quebec retains the power to achieve the balance between cultural uniqueness on the one hand and legal integration on the other which it requires for its development. Ultimately, it is for the residents and political leaders of Quebec to decide when proposals for harmonization are unacceptable. Often such proposals will be unacceptable, but this will not always be the case.

The Mechanisms of Harmonization: The Canadian Experience

Interjurisdictional harmonization of laws has for many years been the focus of attention in Canada. As a result, a considerable amount of experience with different mechanisms for securing harmonization has been accumulated. In the following paragraphs, the most significant of these are described in a general outline.

It is important to keep in mind that "law" as used in this overview includes more than just legislation. The term is used to refer to acts of legislatures, regulations enacted pursuant to power in legislation, the design of bureaucratic structures established to administer legislation and the rules and practices of such structures. The various mechanisms described in the following paragraphs of this section do not have application to all types of law.

Spontaneous Harmonization

It is not uncommon to find that aspects of the law of several jurisdictions are substantially similar even though no formal machinery for security harmonization has been established to produce this result. This spontaneous form of harmonization is the product of the decision made separately by legislators or bureaucrats in the affected jurisdictions to adopt as models aspects of the laws of other jurisdictions. In some cases, a model may not be actual legislation enacted in another jurisdiction but may be in the form of recommendations issued by a law reform agency or specially appointed commission. In most cases, the decision to use the foreign law as a model is less likely to have been induced by a desire on the part of the adopting legislators or bureaucrats to have harmonized or uniform law than by a recognition that the laws of their jurisdictions could be improved if they were to be patterned on the foreign model. The benefits of harmonization are, consequently, only a by-product and not the motivating factor. Harmonization through emulation is most likely to occur when some jurisdictions lack the resources or will to undertake the research which usually precedes the creation of significant restructuring of laws. Legislators or bureaucrats decide to benefit from the research and experience of the jurisdiction whose laws have been chosen as the model.

Examples of spontaneous harmonization of provincial law in Canada are numerous. Harmonization of a broad spectrum of laws of common law provinces resulted from the practice of adopting as the law of each province the law of England as it existed on a specified date. While the date of reception of English law varied from jurisdiction to jurisdiction, a high level of harmonization of adopted common law was maintained by the inclination on the part of Canadian courts to treat English court decisions dealing with common law principles as sources of the common law in Canada.

The practice of adopting the common law was complemented in many provinces by the practices of using English legislation as a model for provincial legislation. For example, sale of goods acts, partnership acts, and fraudulent conveyances acts of most provinces were copied, with very few changes, from English legislation. In some cases, legislative models were Canadian in origin. For example, legislation initially enacted in

Ontario before the turn of the century which was designed to prevent fraudulent preferences of conveyances by insolvent debtors, and to provide for a prorated distribution of assets of a debtor among his creditors, was copied by most of the remaining provinces. More recent examples are to be found in the area of securities and corporation law. Securities legislation enacted in Manitoba and Ontario has been used as a model for legislation in other provinces. The *Canadian Business Corporation Act*, enacted by Parliament in 1975, has become the prototype for new business corporations acts in Alberta, Saskatchewan, Manitoba and New Brunswick, and has influenced legislation in Nova Scotia, Ontario and Quebec.

Spontaneous harmonization has been a very important factor in the development of the laws of the common law provinces of Canada. However, it is at best a haphazard method of securing harmonization. It can have effect on a national scale only so long as the adopting jurisdictions all choose the same model. This has rarely been the case in Canada. Further, since the decision to proceed in this manner is seldom motivated by a desire for harmonization, it is only fortuitous that the laws which end up harmonized in this manner deal with matters of national significance.

The need or willingness of provincial legislators to copy laws from other jurisdictions has diminished in Canada since several provinces established their own law reform agencies in the form of law reform commissions, research divisions of departments of attorneys general or ad hoc special committees of experts. These agencies are capable of providing the necessary background research and technical expertise. The fact that there have been institutional, financial and motivational barriers to cooperation among provincial and federal law reform agencies has meant that the reduction of spontaneous harmonization resulting from the creation of these agencies has not been replaced by harmonization through cooperation and coordination among them.

Induced Harmonization

A technique for securing harmonization of provincial law which in recent years has played an important role in Canada is the use of the federal spending power to induce provinces to accept uniformity or substantial uniformity in the design and delivery of public programs. Federal participation in the funding of these programs is made conditional upon provincial compliance with federally prescribed procedures and standards. The most celebrated example of this form of harmonization is that resulting from the *Medical Care Act* of 1967, the *Federal-Provincial Fiscal Arrangements and Established Programs Financing Act* of 1977 and the *Canada Health Act* of 1984. The federal legislation provides for payments to those provincial medical health schemes which meet criteria prescribed by the legislation. Federal funding has induced a measure of

standardization in other areas as well including housing, legal aid and crop insurance. This approach to harmonization has been very successful. For example, federal financial support for provincial medical programs has been of such a magnitude that until recently no province has been willing to assert its freedom to deviate from the federal standards and lose the federal contributions.

The technique, however, is not without its problems. The use of the federal spending power to induce harmonization in an area of concurrent federal-provincial legislative jurisdiction is generally accepted as a legitimate exercise of parliamentary legislative power. However, it is quite a different matter when it is used to coerce provinces to adopt federally dictated rules and standards in areas which fall primarily or exclusively within the legislative jurisdiction of the provinces. In this context, it is viewed by some as an unconstitutional invasion of provincial powers and, as such, a threat to the federal structure of the country. It is pointed out that this technique could theoretically, at least, be used by the federal parliament to gain de facto legislative power over all matters which require significant financial involvement on the part of the government. In effect, the technique has been used to accomplish at least in part what has proven to be impossible under Section 94 of the *Constitution Act, 1867.*

The de facto loss of provincial control over matters which are constitutionally within provincial legislative jurisdiction is not the only objection to federally induced harmonization voiced by provincial legislators. They point out that, on occasion, the operational rules of federally initiated schemes in which provinces have been induced to participate are unilaterally changed by the federal government, usually with the result that a greater portion of the cost of the schemes is borne by the provinces than was contemplated when the schemes were established.

Whether or not the Supreme Court of Canada ultimately rules that induced harmonization is unconstitutional, there can be little doubt that it violates the spirit of the *Constitution Act, 1867* to the extent that it is used by Parliament to gain de facto legislative power over matters within provincial jurisdiction. Nevertheless, the effectiveness of this approach to harmonization prevents it from being universally condemned. Indeed, there is every reason to believe that its use in certain areas currently has widespread support among Canadians. Canadians are not prepared to allow a rigid constitutional structure to prevent the implementation of social programs which require nation-wide standards. Indeed, it may be argued that the need for intervention by the federal government is induced by the failure on the part of provincial legislators to establish and use effective machinery through which the necessary harmonization of provincial law could be secured. For example, Professor Wuester's paper in this volume points to the growing support among education experts for increased involvement by the federal government in primary and second-

ary education so as to ensure greater equalization of educational opportunities and to induce harmonization of provincial education policies dealing with core curricula, entrance and graduation criteria and teacher qualifications. In the opinion of these experts, involvement by the federal government is required because of the failure on the part of the Council of Education Ministers to demonstrate a willingness or capacity to develop national education policies for Canada.

Induced harmonization through federal action is one method of securing a temporary de facto change in the allocation of constitutional power in order to serve national goals. When de jure change is difficult to accomplish, and other harmonization methods fail or are ignored, this method may have to be employed as a safety valve in the Canadian constitutional structure. Where widespread public support for federal intervention exists, Canadians are indicating a choice in favour of centralized solutions and are subordinating the protection of local autonomy. Electors know that if the coercive power of the federal government is abused, they are able to demonstrate dissatisfaction as electors of federal parliamentarians or as members of federal political parties.

If induced harmonization in this form is to continue to be used in Canada, great care should be taken to avoid abuse of the technique. Its primary use has been in situations where the federal spending power can be employed to induce provincial participation in programs. However, there are areas of shared or concurrent federal-provincial jurisdiction which require coordinated action on the part of both levels of government and which do not involve large expenditures on the part of either level of government. In the context of these matters, good will must be a major element in the harmonization process. Provincial legislators who feel aggrieved at having lost to the federal parliament de facto control over matters within their legislative competence, or who feel that they cannot trust the federal government to honour the terms of the tacit agreement underlying federally initiated schemes, are not likely to have the necessary positive attitude toward federal-provincial cooperation. The result is that the techniques of harmonization which are based principally on intergovernmental agreement between the federal and provincial governments will have less chance of succeeding.

There is another form of induced harmonization which is similar to that discussed in the preceding paragraphs in that it includes federal involvement, but differs in that such involvement is nothing more than a threat on the part of Parliament to take the necessary measures to ensure harmonization of law throughout the country by direct action. The threat of federal action may be sufficient to induce provincial legislators to set aside their differences and to arrive at an agreement which forms the basis for harmonization of provincial law. There is clear evidence that the ever-present threat of federal intervention in the regulation of the Canadian securities market has been one of the factors which accounts for the

extensive cooperation which exists among provincial securities commissions in Canada. In Australia, induced harmonization has been one of the primary mechanisms for securing harmonization. The interest in harmonization that state legislators have displayed in recent years in large measure can be attributed to fear of encroachment by the Commonwealth parliament into unoccupied areas of concurrent legislative jurisdiction. A more activist variant of induced harmonization has been used frequently in the United States. Congress has enacted several pieces of legislation which by their own provisions become inoperative in a state where local state law deals with the subject matter of the federal legislation in a substantially similar manner. The effect of the federal legislation is to induce the states to enact legislation which meets the federal standards and which, consequently, is similar to equivalent legislation in other states.

Bureaucratic Harmonization

Experience in Canada has demonstrated that harmonization of law may result from joint action on the part of bureaucracies established to administer government programs and regulatory structures. It is not difficult to understand why frequent contact between government officials of various jurisdictions occurs and why this contact often results in a high degree of harmonization of the bureaucratic structures, administrative rules and even the empowering legislation within which these officials function. In many cases, the officials from the various jurisdictions are carrying out very similar functions and have common professional interests. Experience in one jurisdiction is very useful for officials in other jurisdictions. Often the type of activity which is regulated is not confined to a single jurisdiction and a need for a harmonized approach to regulation is readily apparent.

A feature not endemic in, but frequently associated with, bureaucratic harmonization is the direct or indirect participation in the harmonization process by persons or organizations being regulated. This involvement is induced in part by the desire on the part of those regulated to avoid the necessity of having to comply with different regulatory schemes in different jurisdictions.

Provincial bureaucratic harmonization has been a central feature of securities market regulation in Canada. As early as 1930 a meeting of provincial securities administrators was held to examine the possibility of securing uniform administrative practices throughout Canada. Additional meetings were held in 1934 and 1938. While meetings of securities administrators later began to be held on an annual basis, securities legislation and administrative procedures and policies continued to diverge until the mid-1960s. A new period of cooperation began in 1966 when the Ontario Securities Commission provided leadership in bringing

forward for discussion with other provincial commissions proposals for revision of securities law dealing with a wide range of matters. The Ontario proposals were adopted in several other jurisdictions. Spurred on by recurring suggestions that federal involvement was necessary, provincial securities administrators began in 1967 to publish national policy statements applicable throughout the country dealing primarily with distribution of securities and regulation of mutual funds. At the same time, the administrators of the five western provinces, those with substantially similar securities legislation, agreed to a number of common uniform policies addressing distributions and the continuing disclosure obligations required under their legislation. Since then the process of policy formulation has become somewhat more formalized; proposed national policies are frequently published for comment and respondents are invited to send their submissions to all the provincial and territorial administrators and on occasion also to interested industry self-regulatory organization. Moreover, it is now common for two or more provincial administrators to undertake studies of potential new policy developments with a view to presenting the results to others, and there have been consistent attempts to coordinate local policies with national ones and with the local requirements of other provinces. These processes have been complemented by the use of joint hearings not only with respect to policies, but also in connection with adjudicative proceedings. The provincial administrators have thus gone to great lengths to avoid conflicts between their divergent schemes and to emphasize their regulatory compatibility. Indeed, if there is a modern goal among administrators it is no longer uniformity but compatibility.

Another example of bureaucratic harmonization in its most highly developed form in Canada is to be found in the public regulation of the insurance industry. Generally, insurance law in Canadian jurisdictions provides for extensive supervision of the activities of insurance companies. Administrative responsibilities prescribed by law are carried out in each jurisdiction by a Superintendent of Insurance. In 1917, the Association of Provincial Superintendents of Insurance was organized, and in the following years the Association became not only a forum for discussion of common regulatory issues and exchange of data, but also a source of uniform insurance legislation and standard guidelines for governing the conduct of the insurance industry throughout Canada.

The Association has no secretariat, but relies very heavily on the insurance industry to supply information and expertise in drafting guidelines, regulations and legislation. It meets annually with insurance industry representatives and considers reports prepared by committees composed of representatives from the industry and the superintendents' offices as well as detailed submissions made by spokesmen for the industry. These reports and submissions usually deal with proposed changes in uniform legislation, superintendents' guidelines and other matters of

common concern. Thereafter, formal decisions are made by the superintendents in closed session. A notable feature of the activities of the Association is the fact that its annual meetings are held with very little publicity. Active participation is limited to superintendents and representatives from the insurance industry. Public interest groups and independent legal experts play no role in the formulation of rules, guidelines or proposals for change in insurance legislation. Further, no government departments other than those responsible for legislation are represented at the annual meetings.

There is no doubt that under the auspices of the Association, many features of provincial insurance legislation, especially among the common law provinces, have been remarkably uniform for more than fifty years. While the high degree of harmonization which exists in many aspects of Canadian insurance law cannot be entirely attributed to the Association, it has been most successful in reacting to minor variations once a consensus on general issues has been developed. The success of the Association has induced both the Uniform Law Conference of Canada and provincial law reform agencies to defer to it in the reform and promotion of uniform provincial insurance law.

Bureaucratic harmonization is an important method through which destructive diversity among the laws of Canadian jurisdictions can be reduced, particularly in the context of regulations and administrative practices which can be an impediment to nation-wide economic activity. Cooperation among bureaucratic agencies in the various jurisdictions can lower the cost of government by reducing duplication of effort in the design of administrative rules and structures and by avoiding the repetition of the same problem in several jurisdictions. At a stage in Canadian development when government involvement is so widespread, bureaucratic harmonization must play an important role.

It is important to recognize, however, the dangers associated with this mechanism of harmonization. It not only presents all of the dangers associated with any form of harmonization but in addition presents one of them in a particularly virulent form. Bureaucratic harmonization involves law making by an elite, unelected group of people. This is particularly a matter of concern to the extent that the laws involved are in the form of precedural rules and regulation, the implementation of which does not involve enactment of provincial or federal legislation. Accountability is diluted when the source of law is a national organization of bureaucrats and not local bureaucrats. This problem is exacerbated when the machinery for bureaucratic cooperation makes little room for the involvement by individuals or organizations other than those being regulated. It becomes intolerable when the bureaucratic machinery becomes in part at least a tool of the regulated. This appears to be the case in the context of insurance law making in Canada.

It is unrealistic to conclude that all of the objectionable features of bureaucratic harmonization can be eliminated. As is the case with other mechanisms for securing harmonization, it must be accepted as a necessary, if not entirely welcome aspect of Canadian federalism. However, it should not be accepted in a form which insulates its participants from any significant democratic control or from broad public involvement.

Institutional Harmonization

The perception of a need for harmonization of law in a federation like Canada has led over the years to the creation of organizations that have a mandate to develop proposals or models which could form the basis for uniform or harmonized law. Bodies created specifically to secure harmonization have come in different forms. Some are ad hoc with a mandate to deal only with a specific area of law. These bodies have no permanent existence and disband when recommendations for harmonization have been made. The Dominion-Provincial Committee on Uniform Company Law created in 1935 and the Canadian Bar Association Committee on a Model Uniform Personal Property Security Act created in 1963 fall into this category. By contrast, the Uniform Law Conference of Canada, and the committees of attorneys general and deputy attorneys general have more general mandates or objectives with the result that they continue in existence after the completion of work on a specific area of law. Other differences exist as well. The Canadian Bar Committee was the creation of a non-governmental organization, while the committee of attorneys general, by definition, involves elected government officials. The Uniform Law Conference of Canada falls somewhere between these two bodies. Its creation was due to the activities of the Canadian Bar Association, but for the most part, its membership is confined to government-designated representatives and chairpersons of provincial and federal law reform agencies.

A separate category of organization, which in recent years has been looked upon as having some potential as a mechanism for securing harmonization, includes law reform commissions and research branches of attorneys general's departments. Law reform agencies differ from other bodies noted above in that interjurisdictional harmonization of law has not been considered to be an important aspect of their mandates. If harmonization is considered at all by them, it is given a very low priority.

Because of this diversity of structure and mandate, there is no useful purpose in attempting to compare the various types of harmonization bodies. In any event, there is no evidence to indicate that any one of the existing types of harmonization bodies has been so successful as to warrant its choice as an exclusive model. In the following paragraphs, three specific organizations, the Uniform Law Conference of Canada,

the Canadian Bar Committee on a Model Uniform Personal Property Security Act, and Canadian law reform agencies, are separately examined. In addition, the role of the Supreme Court of Canada as a harmonizing institution is examined.

The Uniform Law Conference of Canada

The Uniform Law Conference of Canada, formerly the Conference of Commissioners on Uniformity of Law and later the Conference of Commissioners of Uniform Legislation in Canada, held its first meeting in 1918. Its formation was primarily a result of efforts of the newly formed Canadian Bar Association which was founded four years earlier. The Conference was modelled on the American National Conference of Commissioners on Uniform State Law, which came into existence in 1892. The declared purpose of the Uniform Law Conference of Canada is to promote uniformity of legislation throughout Canada or in such provinces as uniformity may be found to be practicable, by such means as may appear suitable to that end. The Conference has met every year since 1918 with the exception of 1940. The early, close links with the Canadian Bar Association have substantially fallen away. The Association is not formally represented on the Uniform Law Conference of Canada and the existing ties amount to little more than a formal statement of current activities that is presented to the annual meeting of the Canadian Bar Association by the incumbent president of the Uniform Law Conference of Canada and a seldom-used power given to the Association to put forward specific areas of law for inclusion in uniform acts. Since its inception, the Conference has published over sixty separate uniform acts covering a wide range of subject matter and is constantly engaged in revising and amending these acts as well as considering reports and preparing new acts.

With the exception of some of the commissioners from Quebec, commissioners of the Uniform Law Conference are appointed by governments. Initially, commissioners were drawn exclusively from the provinces, but the federal government has participated in Conference proceedings since 1935. Quebec was intermittently represented between 1918 and 1941, but since 1942 it has been regularly represented by a member of the Quebec Bar. The Quebec government began to appoint commissioners in 1946. Yukon and the Northwest Territories joined the Conference in 1963.

Initially the provinces appointed their representatives pursuant to statute or by order-in-council. Since 1950, both the provinces and the federal government have sent to the annual meeting a large number of non-commissioner delegates who nevertheless participate in all aspects of the proceedings of the Conference except voting. The delegates are drawn predominantly from the ranks of government lawyers, legislative counsel, deputy attorneys general, Crown prosecutors and others. In

recent years the chairpersons of the provincial and federal law reform agencies have attended as ex officio commissioners. The Conference includes only a very few academics and practising members of the private bar, and they amount to a small percentage of the total membership. There are no judicial representatives and, with the exception of attorneys general who hold office ex officio but only sporadically participate in the proceedings, no representatives from the various legislatures. At the Conference, delegates are independent and not formally under the instruction of governments of the jurisdictions they represent.

Any commissioner or the Canadian Bar Association may suggest a topic to the Conference for consideration as a subject of a uniform act. Most suggestions are designed to harmonize existing or proposed provincial legislation, but intermittently the Conference has taken the initiative in drafting a uniform act not based on extant legislation. The Conference has also expanded its activities into new areas. It established a criminal law section in 1944 and a legislative drafting section in 1968.

In determining whether or not to adopt a recommendation in favour of a new uniform act the uniform law section, which deals with all questions concerning uniform legislation, is required to take into consideration the following factors:

- whether there is an obvious need for, or whether it is in the public interest to have, a uniform act on the subject;
- whether there has been any demand from any quarter for uniformity of legislation on the subjects;
- whether there is any indication that the proposed legislation would have some likelihood of being enacted.

If a topic is accepted by the Conference as suitable for uniform legislation, it will be referred to the delegates from one or more jurisdictions to prepare a draft uniform act on the basis of the policy matters determined at the meetings. When a draft act has been prepared it is scrutinized by the whole section. A draft act may then be referred back to the Committee or even to another group of delegates for further study until a mutually acceptable draft act is agreed upon and adopted by the section.

The uniform law section makes little use of outside experts in the drafting of uniform acts, and draft uniform acts are not generally exposed for public study and comment before they are adopted. Once a uniform act is adopted by the Conference, commissioners from each jurisdiction are expected to advise their governments of that fact and to provide them with a copy of the act and relevant materials relating to it. However, commissioners are not obligated to press for adoption of a uniform act by their respective governments. This is left entirely to the discretion of each government and no pressure is brought to bear at any time on a jurisdiction to adopt uniform legislation, to bring its extant legislation into line

with a uniform act, or to desist from adopting non-uniform amendments if the jurisdiction has adopted a uniform act.

The Conference operates on a very modest budget. Its source of revenue is contributions by the provinces and the federal government. The Conference has a part-time, remunerated executive secretary, but otherwise has no secretariat and no independent research capabilities. It must rely on the willingness and availability of commissioners and other delegates to combine voluntary work for the uniform law section with the discharge of their regular professional duties. Since 1974, the federal government has made available to the Conference a modest annual research grant which has enabled it to hire outside consultants for a few special projects and to pay the travelling expenses for non-delegates serving on special committees. So far the Conference appears to have made only sparing use of this funding source.

The Uniform Law Conference of Canada cannot be condemned for inaction. As noted above, the Conference has to date published a large number of uniform acts covering a wide range of subject matter. However, its ability to secure harmonization of provincial law has not been commensurate with its ability to produce models for harmonization. Only one uniform act has been adopted in all Canadian jurisdictions and at least three uniform acts have not been adopted in any jurisdiction. Twenty uniform acts have been adopted in five or fewer jurisdictions, while 24 acts have been adopted in six or more jurisdictions.

If there is one area of law in which the Conference could have been expected to be successful in securing a large measure of harmonization, it is personal property security law. A strong case can be made for harmonization in this area of the law since many financing organizations carry on business throughout the country and many financing transactions involve mobile collateral which may be moved from one jurisdiction to another. The Uniform Law Conference published between 1922 and 1931 uniform acts dealing with the four personal property security devices most widely used in common law jurisdictions: conditional sales contracts (1922), chattel mortgages (1928), assignment of book debts (1928) and corporation securities (1931). In the following years, the uniform acts were in some cases amended and in other cases totally replaced.

While the uniform acts dealing with personal property security law were in their various forms enacted in whole or in part in many jurisdictions, the goal of uniformity was never realized. On the surface, the record looks impressive. According to a recent report of the Conference, the Uniform Bills of Sale Act was adopted in nine jurisdictions, one or other of the Uniform Conditional Sales Acts was adopted in seven jurisdictions, and the Corporation Securities Registration Act was adopted in six jurisdictions. However, this picture is deceptive. An accurate assessment of the success of the Conference in attaining the goal of uniform personal property security law throughout Canada necessarily

involves more than counting the number of adopting jurisdictions. Not all adopting provinces enacted the uniform acts in their entirety. But, even if this factor is ignored, distortion can be avoided only through a comparison of the population of the adopting jurisdictions with the population of jurisdictions which did not adopt uniform acts. When population is brought into the picture, the record of the Conference looks less impressive. Based on 1981 population statistics, uniform bills of sale legislation was adopted substantially as recommended in jurisdictions representing 11.69 percent of the population. It was adopted with modifications in jurisdictions representing an additional 2.62 percent of the population, and some of its provisions are to be found in legislation of jurisdictions representing an additional 2.56 percent of the population. In total, uniform bills of sale legislation has influenced the laws of jurisdictions representing only 16.87 percent of the population. These figures may overstate the degree of harmony among adopting jurisdictions. The Uniform Bills of Sale Act has been amended and revised on several occasions. Not all adopting jurisdictions amended their acts or adopted the revised legislation.

The picture is only marginally better for uniform conditional sales legislation. The seven jurisdictions which adopted the Uniform Conditional Sales Act in whole or in part represent only 13.44 percent of the Canadian population. A greater measure of success can be claimed with respect to the Uniform Assignment of Book Debts Act which was adopted in jurisdictions representing 62.24 percent of the Canadian population, and with respect to the Uniform Corporation Securities Registration Act which was adopted in jurisdictions representing 43.68 percent of the population.

The most spectacular feature of the Conference's failure is the fact that uniform personal property security legislation has had no influence on the development of the law of Quebec. This should be no surprise, however, since the great bulk of personal property security legislation proffered by the Conference prior to 1971 embodied legal concepts and perfection methods drawn from common law jurisdictions. Until a Uniform Personal Property Security Act was adopted by the Conference, there appears to have been no interest in developing uniform legislation that might have appeal in Quebec. This lack of interest appears to have been shared by the Quebec delegates to the Conference.

There is no shortage of explanations for the apparent failure on the part of the Uniform Law Conference of Canada to achieve the goals of its founders. The following are the most commonly noted deficiencies in the structures and procedures of the organization.

There is reason to conclude that the Conference has been far too ambitious and not careful enough in the selection of areas of law which it puts forward as appropriate for harmonization. It is suggested that had the Conference directed more attention and resources to a few areas

where the need for harmonization could be demonstrated, its record would have been much better.

The Conference's almost total reliance on uniform acts as the vehicle for harmonization is viewed by some as a mistake. This practice developed during the early years of the organization when it was generally felt that many of the differences in provincial legislation were the accidents of draftsmanship and not the reflection of different needs or policy judgments. However, the continued exclusive use of uniform acts would appear not to be justified. In the first place, it is unrealistic to conclude that a significant number of uniform acts will be enacted without change. Those that are adopted as provincial legislation are frequently amended, with the result that uniformity is destroyed. In the second place, the use of uniform acts ensures that Quebec legislators will ignore most of the proposals of the Conference since in form they are unacceptable to a civil law jurisdiction. In the third place, there is a tendency to spend too much effort on detail and not enough on policy formulation and public discussion of underlying legal and social issues.

Lack of expertise appears to have played a major role in discrediting the work of the Conference. Since most of the commissioners and delegates are civil service lawyers, they can hardly be expected to have the necessary expertise in the many private law areas with which uniform acts deal. In any event, they are fully employed in carrying out their responsibilities as advisers to their respective ministers and generally have little time to devote to the preparation of reports on which uniform acts are based.

The shoestring budget on which the Conference has been forced to operate for most of its existence enables it to do little more than to cover its printing and clerical costs and to pay a modest honorarium to the executive secretary. With the funds available to it, the Conference cannot hope to establish a permanent secretariat, have any in-house research capability or to retain extensive outside expertise when it is necessary for the preparation of uniform acts.

The Uniform Law Conference has not adopted a practice of distributing draft uniform acts for general discussion and reaction by outsiders. In fact, as a general rule, no public reaction or input is sought at any stage of the process which leads up to the preparation of a uniform act. On a few occasions, committees of the Conference have consulted with outside organizations or have had some direct contact with other committees or organizations interested in harmonization of law. However, no formal mechanism is provided to ensure consultation in every case.

Beginning in 1975, the commissioners agreed to notify their respective governments of the adoption of new uniform acts. Their obligations do not extend beyond this modest point, and it is unusual for commissioners to lobby actively for the adoption of a uniform act in their jurisdictions.

It is, of course, very difficult to assess the validity of the various criticisms of the structure and procedures of the Uniform Law Conference of Canada. On the surface, many of them appear valid. One measure that is available for this purpose is to compare the Uniform Law Conference with its counterpart in the United States, the National Conference of Commissioners on Uniform State Law. The American organization does not suffer from many of the perceived deficiencies of the Uniform Law Conference of Canada. The National Conference has a permanent secretariat. The funding which it receives from appropriations by the states and contributions from the American Bar Association and charitable foundations is lavish by Uniform Law Conference of Canada standards. It has sufficient resources to finance the activities of its committees of experts. Unlike the Uniform Law Conference, the American organization has a written constitution. Conference commissioners are appointed by the states they represent, often pursuant to special statutory power. Typically, the governors of the states have appointed practising lawyers, judges and law professors as commissioners. The constitution of the Conference provides for associate members who are principal officers of state agencies charged by law with the duty of drafting legislation in the state. Associate members serve on committees and participate, without vote, in Conference proceedings. All commissioners and associate members must be members of the state bar association. Provision is also made for advisory members. The Conference has a standing committee including liaison members from each state whose main task it is to endeavour to secure the enactment of uniform acts.

In recent years, all proposals of subjects for legislation are referred to a committee which, after due investigation, and sometimes a hearing of the parties interested, reports whether the subject is one upon which it is desirable and feasible to draft a uniform act. The tradition of the National Conference is to have uniform acts drafted by special committees. These committees are structured so as to involve experts, many of which are drawn from American law faculties. Academics serve without remuneration, but all of their expenses are paid. The prestige of the National Conference is such that the opportunity to serve on one of its special committees is coveted by academic experts.

Although the National Conference has sponsored more than 225 uniform and model acts, by its own admission its ability to secure harmonized state law has been disappointing. Nevertheless, it appears to have been more successful than the Uniform Law Conference of Canada. Of the 150 acts which as of 1981 were recommended for adoption by all jurisdictions, 24 had been adopted by no jurisdiction, 1 had been adopted in all jurisdictions, 20 had been adopted by 40 or more jurisdictions and 26 had been adopted by half of the 51 jurisdictions of the United States.

On the surface, this record does not look significantly better than that of the Uniform Law Conference, even when one takes into consideration the fact that the National Conference pursues harmonization of the law of 51 jurisdictions while the Uniform Law Conference need be concerned with only 12. However, a close look at the National Conference's record reveals a large measure of success in the important area of commercial law, a feat which so far has eluded the Uniform Law Conference of Canada. Until the promulgation of the Uniform Commercial Code, the score card for the National Conference and that of the Uniform Law Conference of Canada so far as they related to harmonization of commercial law looked very much the same. However, the success of the Uniform Commercial Code placed the organization in a different league. Working in cooperation with the prestigious American Law Institute, the Conference prepared and promulgated in 1952 a code of commercial law dealing with sales of goods, negotiable instruments, bank deposits and collections, letters of credit, bulk transfers, documents of title, investment securities and secured transactions. By 1981, all jurisdictions had enacted eight of the nine articles (parts) of the Code and all but one had enacted the entire Code. While the goal of complete uniformity of these areas of commercial law has not been, and likely never will be, achieved, substantial harmonization does exist. In order to discourage local variations and ensure that the Code is kept current, the Conference has established permanent editorial boards.

It would be a mistake to assume without further inquiry that the success of the National Conference with respect to the Uniform Commercial Code was solely a product of superior structure and procedures. No doubt factors were present which in part at least explain why the Uniform Commercial Code was so much more popular with state legislators than other uniform acts. If structure and procedures alone were the determining factors, it is difficult to explain why the Uniform Consumer Credit Code which was promulgated in 1968 by the National Conference has been enacted in only a few states.

It has been noted that the National Conference undertook to prepare the Uniform Commercial Code at a time when organized groups, in particular business organizations, were themselves beginning to consider the possibility of having a uniform code of commercial law. In other words, there was a market demand and the Conference supplied the product to meet that demand. The Uniform Commercial Code was made available at a time when the commercial law of most jurisdictions was very much in need of reform and updating. The same could not be said of consumer credit law. By the time the Conference made available the Uniform Consumer Credit Code, many states had put in place modern, effective consumer protection legislation, and now the Code is often described as too little, too late. Further, while the areas of law covered by the Uniform Commercial Code are not totally devoid of social policy

questions, it is clear that they are less likely than an area such as consumer credit to invoke widespread disagreement in different jurisdictions as to the basic approaches to be employed in their reform.

There is an additional factor which is important to the widespread adoption of the Uniform Commercial Code. The Code ultimately gained the support of the American Bar Association, state bar associations and business organizations. All of these agencies played a role in popularizing the Code in various jurisdictions and encouraging its adoption by state legislatures.

There are, perhaps, lessons to be learned from the National Conference's experience with the Uniform Commercial Code. It is important to have some mechanism for accurately assessing the need for and general interest in harmonization of specific areas of the law. This involves identifying the extent to which agreement among jurisdictions is likely to exist with respect to the basic issues and the policy directions that might be embodied in harmonization models. The harmonization machinery should be designed to draw on the available expertise in the country and to ensure widespread consultation with interested persons and organizations. Once a model for harmonization is developed and given widespread exposure, measures should be taken to educate legislators as to the benefits associated with the proposal and to cooperate with organizations which can influence the attitude of legislators toward it. If some or all of these measures are in fact central to the success of harmonization efforts, it is not difficult to see why the Uniform Law Conference of Canada has not been more successful in fulfilling its mandate.

Canadian Law Reform Agencies

Five Canadian provinces have law reform commissions and four others have research and reform units in their Justice ministries. In addition, a Canadian Law Reform Commission has been established by parliament. On the surface it would appear that since measures designed to introduce interjurisdictional harmonization frequently involve proposals for the reform of existing law, law reform agencies would be ideally situated to play a central role in the harmonization of law. The reality is otherwise. To date, at least, the involvement of the agencies in harmonization efforts at best has been minimal. A close look at the mandate, structure and resources of law reform agencies provides an explanation for their relative unimportance to interjurisdictional harmonization. Very few, if any, of them have a specific mandate to work toward harmonization of law, particularly where local considerations must be subordinated to the goal of interjurisdictional harmonization. The variety of structures and disparity of resources make joint projects very difficult. Some agencies do not have resources sufficient to permit research officers to attend meet-

ings and to participate with other agencies in the preparation of model legislation. Some commissioners are naturally reluctant to accept the findings of researchers who may not have taken into consideration factors peculiar to their jurisdictions. Further, the research and reporting procedures differ significantly from one agency to the next.

There is nothing inherent in the structure of a law reform agency which precludes it from involvement in harmonization efforts. If attorneys general who refer matters for study to their agencies, or boards of directors who select research projects, are prepared to direct the agencies under their control to participate in joint research projects designed to produce models for harmonization or to recommend, wherever possible, an existing harmonization model as the basis for reform in their jurisdictions, a useful mechanism for securing proposals for harmonization exists. To date, however, there has been little enthusiasm for doing so. In some cases at least, a move of this nature would entail the allocation of greater financial resources to the agencies than are now provided. Without new resources, some agencies would have to ignore important aspects of their mandate unrelated to harmonization.

It may be more realistic to view the role of law reform agencies in the pursuit of interjurisdictional harmonization as being peripheral. In other words, they may be able to contribute to interjurisdictional harmonization, but only incidentally through relatively minor changes in the way in which they pursue their general mandates. For example, agencies may be influential in producing a measure of harmonization by relying more heavily on the basic research of other agencies which have published reports dealing with matters of common interest and thereby resist the temptation to reinvent the wheel. This would be facilitated through the creation of a system through which research activities and reports of the various agencies are brought to the attention of and made available to other agencies.

Cooperation between law reform agencies and organizations such as the Uniform Law Conference of Canada has produced positive results. In 1979 the chairs of the law reform agencies, all of whom are Uniform Law Conference commissioners, induced the Conference to undertake a study of sale of goods law in Canada. The matter was not, however, to be approached *ab initio*. A special committee of the Uniform Law Conference was created and instructed to focus primarily on an extensive report dealing with the law of sales prepared for and published by the Ontario Law Reform Commission. The special committee was composed primarily of experts appointed by the Conference but nominated and remunerated by participating law reform agencies or provincial governments. The committee ultimately produced a report recommending a Uniform Sale of Goods Act, and its recommendations were adopted by the Conference.

The importance of this exercise as a precedent derives from several of its features. The extensive research that had been undertaken by the Ontario Law Reform Commission was utilized by the special committee, thereby producing a significant saving of resources. The committee was composed of experts in the law of sales, most of whom were nominated and remunerated by the law reform agencies. While it is still too early to predict the ultimate outcome of the experiment, there is evidence to indicate that the involvement of nominees of the law reform agencies in the preparation of the Uniform Sale of Goods Act will give to provincial legislators greater faith in the quality of the product and, perhaps, a greater commitment to its ultimate enactment with few changes. The fact that the Uniform Law Conference has refused to view the Sale of Goods Act project as a precedent to be followed in other areas points perhaps not to the failure of the experiment but to the need for substantial revamping of the Conference.

Before leaving a discussion of the law reform agencies, it is necessary to make a few observations about the role of the Canada Law Reform Commission in efforts to harmonize Canadian law. To date, the Commission has failed to assume a leadership role for itself in the pursuit of coordinated development of federal and provincial law, notwithstanding the fact that several of the projects that it has undertaken have involved matters which fall within concurrent federal-provincial legislative jurisdiction. This may be due in large part to the fact that harmonization of law is not specifically mentioned in the legislative mandate of the Commission. It may also be a product of the reluctance on the part of provincial law reform agencies to allow the federal Commission to assume a leadership or coordination role.

The disservice to the nation which results from the lack of cooperation among law reform agencies is amply demonstrated in the context of reform of evidence law. In the early 1970s, both the Canada Law Reform Commission and the Ontario Law Reform Commission separately undertook to study and reform this area of the law. It is not difficult to demonstrate the value in having uniform rules of evidence in Canadian courts in all matters whether within federal or provincial legislative jurisdiction. Nevertheless, the two Commissions were unable to work together or cooperate with each other, with the result that each published its own report on reform of the law of evidence containing many disparate recommendations. After intervention by a committee of deputy attorneys general, a task force on evidence was established by the Uniform Law Conference, with a mandate to bring about uniformity among the provincial and federal rules of evidence. In 1981 the Conference adopted the Uniform Evidence Act based substantially on the recommendation of the task force. Even if the Uniform Evidence Act is adopted in all Canadian jurisdictions, the cost in terms of loss of time and waste of

resources resulting from the failure on the part of the two most influential law reform agencies in Canada to cooperate with each other cannot be justified at a time when public resources available for law reform and harmonization of law are scarce.

The Canadian Bar Association

Article I of the original 1914 constitution of the Canadian Bar Association stated as one of the objects of the organization the promotion of uniformity of legislation throughout Canada so far as consistent with the basic systems of law in the respective provinces. In furtherance of this objective, the Association was instrumental in the creation of the Uniform Law Conference of Canada. More recently, the Association decided to foster interjurisdictional harmonization in another way. In 1963 the Commercial Law section of the Association created a special committee on a Model Uniform Personal Property Security Act (hereinafter referred to as the MUPPSA committee). The committee's terms of reference were to make recommendations with respect to the advisability, form and content of a uniform act on security in personal property. The impetus for creation of the committee came from a desire on the part of members of the Canadian Bar Association to explore the possibility of inducing all provincial jurisdictions to consider fundamental re-examination of their personal property security law similar to that which was occurring in Ontario at the time.

The MUPPSA committee worked in close contact with a committee of the Ontario Branch of the Canadian Bar Association, which published a report in 1963 recommending a new Personal Property Security Act for Ontario. This report led ultimately to the enactment of the Ontario *Personal Property Security Act* in 1967. The MUPPSA committee, which met intermittently over a period of 19 years, had among its members and participating observers representatives from most provinces and all regions of Canada except the Northwest Territories. Its work was closely followed by the Canadian Bankers' Association and other groups in the Canadian finance industry.

The committee published a report in 1969 which proposed a draft Uniform Personal Property Security Act. While the proposed act was similar to the Ontario *Personal Property Security Act* of 1967, it did depart from the Ontario legislation in several important respects. Thereafter, the committee continued in existence principally to monitor experiences under the Ontario Act and Article 9 of the American Uniform Commercial Code, and to determine what changes, if any, were needed in the 1969 Draft Act. In 1982, the committee presented to its parent organization a revised Model Uniform Personal Property Security Act.

In 1980, the Uniform Law Conference appointed a committee to examine personal property security law and to report on the need to revise the 1971 Uniform Personal Property Security Act. On the recommendation of the committee, the Conference adopted in 1982 the Uniform Personal Property Security Act, 1982 and withdrew its 1971 act. The new uniform act is identical to that adopted in the same year by the Canadian Bar Association following the recommendations of the MUPPSA Committee.

The work of the committee stimulated interest in reform of personal property security law in several provinces and led to the publication of reports recommending the enactment of legislation along the lines proposed by the committee. It induced enactment of personal property security acts in Manitoba, Saskatchewan and the Yukon. The amendments to the Ontario *Personal Property Security Act* that have recently been proposed by a committee of the Ontario Ministry of Consumer and Commercial Relations have been influenced significantly by the provisions of the 1982 Model Act. It remains to be seen whether or not the Model Act will be the vehicle through which harmonization of Canadian personal property security law will be realized; the early indications are encouraging, but the outcome is not certain.

The Uniform Law Conference and the Canadian Bar Association established a joint committee in 1982 with the mandate, inter alia, to monitor the adoption of the Uniform Personal Property Security Act in provinces and territories and encourage adopting jurisdictions to maintain interjurisdictional harmony by adopting it without substantial change. However, due to the lack of funding to defray the costs of the committee, it remained dormant until July, 1984, when it was able to hold its first meeting.

While some features of the origins, structure, and work of the MUPPSA committee are unique to personal property security law, the committee itself is representative of a type of mechanism which can play an important role in interjurisdictional harmonization of Canadian law. It was supported financially by an important, independent professional association, but drew its membership from universities, the private bar, law reform agencies and government. While the Canadian Bar Association sponsored the committee, at no time did it attempt to influence its deliberations or conclusions. All members were experts in personal property security law but did not represent any single group or sector in Canadian society. As well, all governments were welcome to send observers to the meetings and several accepted the invitation. The cost was very small largely because all members worked without remuneration. A few committee members were instrumental in securing change in personal property security law in their jurisdictions based on the Model

Uniform Personal Property Security Act. Rather than competing with other agencies, such as the Uniform Law Conference of Canada or the Ontario Minister's advisory committee on the *Personal Property Security Act*, the committee offered its full cooperation, even to the point of having cross-over membership with these organizations. The committee's recommendation that a "watchdog" committee be established to encourage adoption of the act and discourage deviation from the model was accepted by the Uniform Law Conference of Canada and the Canadian Bar Association.

Ministerial and Deputy-Ministerial Committees

A mechanism for securing harmonization which shows promise is the ministerial or deputy-ministerial committee. While this type of committee lacks an elaborate infrastructure similar to that of organizations such as the Uniform Law Conference of Canada, it has one important characteristic lacking in most other harmonization mechanisms: political power. By definition the members of such committees are people who embody political power or who are very close to the source of power that must be invoked if jurisdictions are to pursue harmonization of law. This mechanism for securing harmonization has only recently been used and it is much too early to judge its efficacy. However, its potential scope, flexibility and access to resources and political power place it high on the list of harmonization techniques which should be carefully considered.

A significant precedent for this approach to interjurisdictional harmonization is to be found in the area of law dealing with security interests in aircraft. In June, 1981, a meeting of deputy ministers of justice decided to establish a federal-provincial working group on a central registry for security interests in aircraft. The working group was composed of experts appointed by the federal minister of justice and the provincial attorneys general of British Columbia, Alberta, Saskatchewan, Ontario and Quebec. An outside consultant was retained and remunerated by the federal Department of Justice.

After meeting several times, the working group prepared coordinated federal and provincial draft legislation which was presented to a conference of attorneys general in July, 1983. Pursuant to the instructions given by the conference to the deputy ministers, the draft legislation was widely circulated among government agencies, the aviation industry and financial and legal communities. Later, meetings were held at which amendments were made to the draft legislation, based on response to some of the criticisms and suggestions received from outside sources. The draft legislation and accompanying report was presented to the federal deputy minister of justice on January 20, 1984. The draft is presently in the hands of statutory drafters and the revised draft bills will be presented to a meeting of deputy attorneys general in 1985.

Several aspects of this exercise are noteworthy. In the first place, it was recognized by the attorneys general and ministers of justice that the subject matter fell within both federal and provincial jurisdictions and that joint action was required. While it was possible to argue that the federal aeronautics power includes the power to establish a national scheme for registration of security interests in aircraft without the cooperation of the provinces, it was decided that a cooperative approach was superior to an approach which would attract provincial animosity and legal confusion. The proposed scheme, if enacted, would involve a significant degree of interjurisdictional cooperation and harmonization of law affecting security interests in aircraft without causing disruption to existing personal property security schemes in the provinces. In addition, it would permit Canada to ratify the 1948 Convention on the International Recognition of Rights in Aircraft. The net benefit to Canada would be significant.

Apart from the almost unprecedented level of interjurisdictional cooperation that characterized this undertaking, the efficiency in terms of both money and time with which the project was completed is noteworthy. Notwithstanding the fact that six separate jurisdictions were involved and three quite distinct legal systems had to be accommodated, and the fact that a reasonable amount of public consultation was undertaken, draft legislation was produced within the space of three years and at very little cost.

It is, of course, much too early to label the undertaking a success. The final and crucial test remains: enactment of the proposed legislation by the parliament of Canada and all provincial legislatures. On the surface, at least, the necessary elements for success appear to be present. There is support at the ministerial level for the basic objectives of the project and support for the draft legislation by the persons and organizations most likely to be affected by it.

The Supreme Court of Canada

One of the characteristics of the Supreme Court of Canada that distinguishes it from final appellate tribunals in other federal jurisdictions is that it is authorized to hear appeals from provincial courts on questions of provincial law even though the Court itself is exclusively a federal creation and its judges are appointed by the federal government. The Supreme Court is therefore endowed with important powers enabling it to maintain doctrinal uniformity among the common law provinces, and it has played this role since its creation in 1875. Prior to amendment of the *Supreme Court Act* in 1974, there was a right of appeal for all decisions of the highest court of final resort in a province where the amount in issue exceeded $10,000. Since that time, such appeals in question of provincial law can only be prosecuted with the leave of the Court.

It must be recognized, however, that the opportunities for the Court to foster harmonization of the non-statutory law of the common law jurisdictions are diminishing. An ever-increasing amount of common law is being displaced by legislation. It is clear that the Supreme Court could play a more important role in the harmonization of provincial law if other mechanisms are effective in securing cooperation and coordination in the design of provincial legislation. A decision of the Court with respect to a particular statutory provision will provide a final authoritative interpretation of that provision. If the provision is found in the legislation of several jurisdictions, the Court's decision is, in fact, binding in those jurisdictions. However, in order for this to occur, a degree of harmonization approaching uniformity will be required. While total uniformity is unrealistic, substantial uniformity of an important number of legislative provisions is possible.

An additional factor which has recently reduced the Court's influence on the development of private law is the crush of public law appeals, many of which are based on the Canadian *Charter of Rights and Freedoms*. There is a growing level of concern that the pressure of work may prevent the Supreme Court from giving private law questions that have important national consequences the close attention they deserve. Further, the heavy workload of the Court makes it much less likely that its rules and procedures will be changed in the near future so as to permit broadened third party intervention on matters of national significance. Intervention of publicly appointed officials and representatives of public interest groups would assist the Court in appreciating the effect that its decisions have on interests of persons other than the litigants.

The Supreme Court's role as interpreter of those provisions of the *Constitution Act, 1867* dealing with the division of legislative power between Parliament and the provincial legislators places the Court in the position to influence the development of harmonization or uniformity of legislation throughout Canada. One of the factors that the Court should take into consideration, when asked to define the scope of legislative power of each level of government, is whether or not the subject matter involved is of such importance to the nation as a whole that legislation dealing with it should be uniform or harmonized throughout the country. To decide that it should does not lead to the conclusion that the subject matter must fall within federal legislative jurisdiction. However, if in addition it is of a nature that harmonization of legislation dealing with it is impossible or extremely unlikely if it is found to be within provincial legislative jurisdiction, there is reason to look closely in order to determine whether or not the subject matter can be found to be within federal legislative jurisdiction. There is some recent evidence that the Court may be prepared to use this approach. In *Attorney-General of Canada v. Canadian National Transport, Ltd.* Mr. Justice Dickson, as he then was, considered the scope of Section 91(2) of the *Constitution Act, 1867* which

gives to the Parliament of Canada legislative jurisdiction over "The Regulation of Trade and Commerce." His Lordship stated his agreement with earlier decisions of the Privy Council and the Supreme Court of Canada which had concluded that some limitation had to be placed on this power since not to do so would result in serious curtailment, if not virtual extinction, of the degree of autonomy which the provinces were intended to possess. He reaffirmed the necessity to strike the appropriate "constitutional balance" when determining the scope of Section 91(2). However, he concluded that when deciding whether or not that balance permitted federal jurisdiction over specific subject matter, the Court should look to see if "the provinces jointly or severally would be constitutionally incapable of passing" legislation dealing with it, and whether or not "failure to include one or more provinces or localities would jeopardize the successful operation (of a legislative scheme) in other parts of the country."

While it would be a mistake to read too much into the statement of the Chief Justice of Canada, the approach employed in this case may be the precursor of a greater willingness on the part of the Court to interpret the *Constitution Act, 1867* with greater emphasis on national goals and with greater attention to the question as to how these goals are to be achieved.

Constitutional Mechanisms

Just for the sake of completeness, mention is made here of the power of the federal parliament to use constitutional means to secure harmonization of provincial law. A description of the intent and efficacy of Parliament's power under Section 94 of the *Constitution Act, 1867* has been included in the section on the role of harmonization in Canada.

What remains is to make reference to Section 90 of the *Constitution Act, 1867* which empowers the Governor General in Council to disallow provincial legislation. In theory, this power could be used to enforce a measure of harmonization by preventing a provincial legislature from enacting legislation which would destroy an existing harmonious pattern of provincial legislation. While the disallowance power, unlike the power under Section 94, has been used frequently in the early years of Confederation, its use today for any purpose is most unlikely. The general view is that the modern development of ideas of democratic responsibility has left no room for the exercise of the federal disallowance power.

Formal Harmonization Mechanisms — Are They Needed?

The assumption that harmonization of law dealing with matters of national concern is desirable, if not necessary, in a federation such as Canada may not dictate the conclusion that formal harmonization mechanisms are required. It has been noted in the preceding section that a significant amount of existing harmonization of law, primarily among the

common law provinces, has been spontaneous. The question must be addressed as to whether or not Canadians should be satisfied with the degree of harmonization that occurs in this way.

In some respects, spontaneous harmonization is very appealing. It is, no doubt, the least expensive form of harmonization. It avoids entirely the considerable cost which is associated with any broadly based, formal harmonization mechanism. In addition, it avoids one of the more troublesome aspects of other mechanisms: it is much more democratic in that the decision to bring aspects of local law in harmony with that existing elsewhere is totally free from the coercion which might result if the jurisdiction were a participant in a formalized system designed to secure legal harmony. The choice to adopt or reject a model is induced primarily, if not totally, by local factors and thus electors are less likely to be subjected to laws that are not well suited to their needs.

Spontaneous harmonization, in theory at least, operates in a manner similar to a hypothetical "free market" and as such may be viewed as the best method of determining the optimum level of harmonization in the country. In other words, if there are advantages to be gained from a degree of interjurisdictional harmonization of particular areas of law, they will ultimately be recognized by electors and legislators who, always acting in their own best interests, will pursue them. The degree of harmonization necessary for the optimal functioning of a province and, therefore the country, will be realized.

Arguments in support of spontaneous harmonization are strong in theory. However, the historic evidence indicates that in practice this form of harmonization is likely to be inadequate. While, as noted earlier in this paper, spontaneous harmonization has been a significant aspect of the development of provincial law in Canada, it is difficult to demonstrate that public demand has been the dominant motivating factor behind decisions to use the legislation or legislative proposals of other jurisdictions as models for local legislation. The difficulty and cost associated with a decision to develop indigenous law appears to have been much more important. Proof of this lies in the fact that the willingness on the part of some jurisdictions to adopt legislation of others as models appears to be inversely proportional to the resources and institutions available for law reform in those jurisdictions. Jurisdictions with law reform agencies are less likely to adopt foreign models for legislation than jurisdictions without law reform agencies.

Little reliance is placed on spontaneous harmonization in the United States as a mechanism through which differences among the laws of the states are reduced. The National Conference of Commissioners on Uniform State Law was created for this purpose, and this body continues to play a dominant role in efforts to secure interstate harmonization of law.

Spontaneous harmonization has not served Canada's sister federation, Australia, very well. Australia has no equivalent to the Canadian Uni-

form Law Conference or the American National Conference of Commissioners on Uniform State Law. Most of its states have active law reform agencies which, like their Canadian counterparts, have paid little attention to the need for interjurisdictional harmonization of state and Commonwealth laws. While all states have the same common law background, the rapid displacement of the common law by local legislation has resulted in progressive diversification of Australian law. The harmonization which has occurred in recent years has been the product of cooperative action among the states or between the states and the Commonwealth government. In 1979, the standing committee on constitutional and legal affairs of the Australian Senate published a report entitled "Reforming the Law" in which it called for the implementation of measures designed to achieve uniformity wherever it is possible and appropriate. The Commonwealth government has indicated its commitment to the goal of greater interjurisdictional harmonization and has acted through the Australian National Law Reform Commission to explore with state governments and law reform agencies mechanisms for achieving this goal. While no final conclusions have been reached, it is clear that there is support in Australia for a much more sophisticated and organized approach to harmonization of law. Activities of this kind at the political level are an indication that Australian legislators are unhappy with the results of spontaneous harmonization in their country. The current trend is to move toward some formal mechanism for harmonization among jurisdictions.

Perhaps the greatest weakness in spontaneous harmonization is that is is at best haphazard. As noted elsewhere in this overview, there is no guarantee that all legislators will choose the same model on which to base local legislation unless there is strong public demand that they do so. The necessary degree of national harmonization will be achieved in those rare situations where electors in all jurisdictions recognize the need for harmonization and clearly express a preference for a particular form. It may be argued that harmonization without this degree of public unanimity is not justifiable. However, this approach denies the reality of Canada with its great geographic, social and political diversity. Unless a crisis exists, the need for harmonization is not likely to be recognized at the same time throughout the country, and the public demand for it will be unevenly distributed at any particular time. Even if general public support for coordinated legislative action on a particular matter does develop without some mechanism through which the various approaches can be jointly explored and debated, there is little likelihood of formal harmonization.

It is important to draw a distinction between reliance on spontaneous harmonization as the sole or primary mechanism for securing legal or administrative harmony and reliance on public demands, however manifested, for harmonization which is to be effected through appropriate mechanisms. In other words, public demand for harmonization should

not be associated exclusively with spontaneous harmonization as a mechanism. Public demand can, and in many cases, is best served through the use of other harmonization mechanisms.

What Is to be Harmonized?

Elsewhere in this paper it has been asserted that some form of harmonization machinery is required in order to facilitate the development of Canada as a nation. It has been suggested that the primary role of this machinery is to facilitate harmonization of both provincial and federal laws, including legislation, bureaucratic structures and the rules under which they operate, which affect matters of national concern.

Universal acceptance of this proposition is only an initial step. It may not be difficult to get agreement in Canada that in general some harmonization of law is required; but there is less likelihood that agreement will easily be reached as to the matters which, because of their importance to the country, are proper subject matter for harmonization. Even if this hurdle is overcome, it remains to be determined what types of harmonization measures are appropriate in each case. Research papers prepared for this section focussed on five areas: education law, personal property security law, insurance law, securities law and consumer protection law, all of which fall within the legislative jurisdiction of the provinces, and four of which fall within shared or concurrent federal and provincial legislative jurisdictions. In each case, a need for some type of harmonization measure was found to exist or was recommended as being beneficial. Quite apart from what these research papers reveal about the development of law in Canada pertaining to the matters examined, what they demonstrate is that there are no readily available rules or precise formulae that can be used to identify those matters which should be the focus of harmonization efforts or to prescribe what type or degree of harmonization is required.

By definition, successful harmonization measures involve general acceptance on the part of lawmakers in all participating jurisdictions of the need for harmonization, and agreement as to the contents of the harmonization model. If harmonization entails the enactment of legislation or the expenditure of public funds, it is likely to occur only when lawmakers are convinced there is public support for it. The demands on legislative time and public resources are such that unsubstantiated assertions that there is a need for harmonization of a particular area of law rarely have effect. Further, since harmonization necessarily involves some loss of freedom of action and subordination of local concerns to national concerns, local lawmakers are generally disinclined to see the benefits in it unless public pressure is available to assist them in the identification of those benefits.

Public support for harmonization can come in different forms. Rarely, if ever, will electors be asked to choose between candidates for public office, one supporting harmonization and the other opposing it. More realistically, special groups such as trade associations and professional business and public interest organizations provide the primary source of support for harmonization of those laws which are of particular interest to them.

Until recently, the predominant practice in Canada has been to leave the selection of matters suitable for harmonization to the organization that undertakes to develop the legislative model offered as a basis for harmonization. Under the established practice of the Uniform Law Conference of Canada, proposals for uniform acts come primarily from the commissioners. The Canadian Bar Association has the right to put forward proposals for uniform acts and, recently, law reform agencies have induced the Conference to undertake the preparation of uniform legislation in a few areas. On occasion, the Conference has undertaken to prepare uniform legislation at the request of a government or a committee of attorneys general or deputy attorneys general. However, to date, the Conference has not relied heavily on outside sources for suggestions as to what areas of law warrant its attention. Nor do its procedures require any empirical investigation of the assertion that an area put forward as appropriate for uniform legislative treatment is so perceived by persons who can be expected to be affected by the law or by legislators who will be asked to enact it. Further, the Conference's structure provides no effective mechanism through which interest groups can request that it consider legislation in particular areas important to those groups. Since civil service lawyers are by far the most dominant group among the Conference's commissioners and delegates, the Conference cannot be expected to have effective informal techniques for determining public demands with respect to legislative harmonization. All this being the case, it should be no surprise that there is not more acceptance of uniform acts than there is.

Most of the other harmonization mechanisms described in the preceding section of this overview can perhaps claim to be more responsive to public demands and needs for harmonization in the areas of law with which they are concerned. The Association of Provincial Superintendents of Insurance meets regularly with the representatives of the insurance industry, and its members are well aware of the needs of the industry they regulate. However, they cannot claim to have adequate public contact until representatives of insurance consumers are given the same opportunity to influence insurance law and administration as is given to insurance companies. The Canadian Bar Association Committee on a Model Uniform Personal Property Security Act was created by a broadly based national organization which, because of the large number of commercial law experts in its membership, could be expected to have identi-

fied accurately the need for harmonization of personal property security law throughout Canada. Committees of attorneys general or deputy attorneys general are by definition well situated to assess the need for harmonized legislation and the likelihood that legislatures in their jurisdictions will act on recommendations designed to produce interjurisdictional harmonization.

The question as to what is to be harmonized cannot be answered in specific terms; however, a general answer can be given. Harmonization mechanisms should be designed to identify public demand for harmonization and to seek to fulfill that demand. If harmonization is approached in this way, the restrictions on local freedom of action necessarily incidental to harmonization measures, and the elitism which characterizes the preparation of models for harmonization, become less objectionable.

It follows that harmonization mechanisms should not be designed so as to attempt to induce a demand for harmonization when none otherwise exists. However, it does not follow that, once a demand for harmonization has been identified in one area of the country, efforts should not be directed toward demonstrating to electors and legislators in other jurisdictions the benefits of harmonization and seeking their participation in the harmonization process. Because of the size and diversity of Canada, it is unrealistic to expect that in a significant number of instances demand for harmonization of any particular area of the law will develop simultaneously in all jurisdictions. In many cases the demand will initially be from one or two jurisdictions or regions. An important role for any harmonization agency is to determine whether or not harmonization proposals have widespread support. This can only be done after the merits of the proposals emanating from one region are brought to the attention of interested electors and legislators living in other regions. The effect of such a measure is to determine whether or not there is latent support in these areas for the proposal.

Assessment of Existing Harmonization Mechanisms

There is no scientific way to assess the efficacy of existing or past harmonization mechanisms. There are too many variables and nothing against which to compare Canada's success in securing harmonization.

An initial problem faced by the assessor is to arrive at some conclusion as to what is the optimum level of legal harmonization for Canada. For the most part, this is likely to be a matter of opinion, depending upon what type of country one concludes Canada should be. Those who would have a great deal more legal homogeneity throughout Canada would conclude that the optimum level of harmonization is much higher than that which presently exists. Those who believe that diversity is one source of strength for Canada would be quite satisfied with existing levels. Even

if everyone accepts the proposition put forward elsewhere in this overview that harmonization of law is important to provide a method of dealing with matters of national concern that fall within provincial legislative jurisdiction or shared provincial and federal jurisdictions, sources of disagreement do not disappear. Where there may be a small amount of common ground, there is likely to be widespread disagreement as to what matters are of such national importance that joint action is required in order to deal with them.

Another difficulty that cannot be avoided is the necessity to distinguish between institutional failure and lack of demand or interest in legal harmonization. It is tempting to conclude that if the mechanisms for harmonization were designed differently, there would have been a higher level of harmonization in Canada. For the most part, such a conclusion can be based only on speculation and supposition. Unless it can be demonstrated that Canadian legislators are willing to have a greater measure of harmonization and that their willingness has not been recognized and exploited because of inappropriate harmonization machinery, the reasons for the low level of legal harmonization in Canada cannot be accurately identified.

Any attempt to undertake a scientific assessment of Canada's record in securing harmonization is further frustrated by the fact that comparisons with other federal jurisdictions are only marginally helpful. Canada is unique, and the conditions that make harmonization attractive or unattractive in particular contexts may not prevail in other federal states where a different level of harmonization exists. For example, the first official text of the American Uniform Commercial Code was published in 1952. Within fifteen years, 49 states had adopted the Code. By comparison, the Canadian Bar Association committee on the uniform personal property security act published its draft Uniform Personal Property Security Act in 1969, but 14 years later only four Canadian jurisdictions have adopted modern personal property security legislation similar to that proposed by the committee. Given the fact that the Canadian model legislation was closely patterned after Article 9 of the Uniform Commercial Code, other factors must account for the relative lack of success on the part of Canadians in reaching the goal of harmonization of this area of the law.

The structure of the MUPPSA committee has been described elsewhere in this overview. While it differed greatly from the organizations which sponsored the Uniform Commercial Code the differences, on the surface at least, would appear not to account for the differences in acceptability of essentially the same model in the two countries. The one factor which more clearly than any other distinguishes developments in the United States in this area of the law from those in Canada is the level of interest in modernized, uniform law which has been displayed by the finance industries and legal professions of the two countries. The evidence indicates

that the finance industry played an important supportive role in the development of the Uniform Commercial Code. The popularity of the Code was due largely to the fact that, at the time efforts were undertaken to prepare it, the business and legal communities appreciated the need for modernization and interjurisdictional harmonization of commercial law in general, and of personal property law in particular. The sponsors of the Code responded to a demand; they did not create it. By comparison, widespread support from the finance industry and the legal professions in Canada for modern uniform personal property security legislation has yet to develop fully. The difference in levels of support for interjurisdictional harmonization coming from the business communities of Canada and the United States can, perhaps, be attributed to geographic and demographic differences between the two countries. The small geographic size and high population density of most American states as compared to Canadian provinces produced a situation in which the need for harmonization was much more obvious in the United States than in Canada. It is more likely that the rights of an American financer will be affected by the laws of more than one jurisdiction than is the case with his Canadian counterpart. American financers have more to gain from interjurisdictional harmonization than do Canadian financers.

There is another factor which cannot be ignored—one which may explain the considerable apathy of the Canadian legal profession. Generally, Canadian personal property security law just prior to the time that proposals for a personal property security act were put forward in Canada was better suited to modern business financing than was American law before preparation of Article 9 of the Uniform Commercial Code. In particular, the law of all jurisdictions, including that of Quebec, made available a broadly based, flexible form of security device known as the floating charge. Nothing similar had been allowed to develop in American law. The result was that Canadian lawyers had less reason to be unhappy with local laws than did their American counterparts.

Assessment of harmonization mechanisms is complicated by the dynamic nature of any modern society, including Canadian society. Mechanisms that may have been effective in the recent or distant past may have been made obsolete due to change in Canadian society. For example, there is evidence to indicate that some Canadian jurisdictions became much less interested in the work of the Uniform Law Conference when they created provincial law reform agencies. Further, it can be demonstrated that poorer jurisdictions are more likely than richer ones to adopt uniform acts. This is presumably a product of the fact that poor jurisdictions cannot afford to allocate resources to indigenous research and, as a result, rely on the Uniform Law Conference as a law reform agency. On the basis of this evidence, it may be concluded that a change in the economic fortunes of a jurisdiction may well influence its attitude toward the value of uniform acts.

Any attempt to assess the efficacy of existing harmonization mechanisms or to design new or improved ones must necessarily proceed on the realization that harmonization of law is essentially a political matter. Harmonization mechanisms are political institutions and, as such, they are not subject to accurate scientific assessment. However, the characteristics of effective political institutions of a modern society are identifiable. Standards do exist against which existing harmonization mechanisms can be judged and on which new and improved mechanisms can be based. In order to be effective, a political institution in a modern democratic society like that of Canada must reflect the political, social and economic realities of the society it serves, and it must be flexible enough to accommodate the level of dynamism which that society experiences. It must involve interest groups and, where appropriate, a broad spectrum of the general public in its work. It must have sufficient resources to carry out its mandate. Since the ultimate goal of a harmonization mechanism is to facilitate legislative cooperation, it must have close connections to the political processes of the jurisdictions involved.

Proposals for the Future

Successful harmonization of provincial law is the product of two factors: willingness on the part of provincial legislators to view interprovincial cooperation and coordination as a public policy goal, and availability of effective harmonization machinery designed to facilitate realization of that goal. In the following paragraphs, proposals for a restructured official harmonization mechanism are put forward. However, no claim is made that such a mechanism would bring in a new era of interprovincial cooperation. At best it would provide a structure through which political decisions to coordinate provincial law can be implemented.

Because of the diversity and complexity of modern Canadian society, it would be a mistake to conclude that any single harmonization mechanism, however well designed and funded, will by itself be adequate to serve existing and future needs for the harmonization of law in Canada. Experience to date has demonstrated that formal, government-sponsored organizations such as the Uniform Law Conference of Canada have not been the only, and not always the most appropriate, mechanisms through which to secure harmonization of law. Any single official mechanism should be treated as only one part of a broad spectrum of existing and potential mechanisms. Nevertheless, experience in federal countries such as Canada, the United States and Australia, as well as in groupings of nations such as the European Economic Community, demonstrates the need for at least one official mechanism to facilitate interjurisdictional harmonization of law when the need arises. In Canada, the Uniform Law Conference has been given this mandate.

Criticisms of the Conference's structure and procedures, and perceived failure on the part of the Conference to realize the potential for greater harmonization in Canada, have led to widespread dissatisfaction with the organization and to calls for its reform. If the list of criteria for an effective institution set out above are applied to the Conference, the calls for reform would appear to be warranted. Rather than attempting to provide a blueprint for redesign of the Uniform Law Conference of Canada, however, it is perhaps more useful to describe the general framework of an official harmonization mechanism, referred to as a harmonization commission, which would embody the essential features of an effective political institution and which would have the specific characteristics that most experts who have studied harmonization in Canada suggest it should have.

An effective approach to harmonization of law should include a method to identify those areas of the law which need to be harmonized and for which a broadly based measure of consensus for harmonization can be secured. In addition, it should be designed to reduce the extent to which harmonization is a process of lawmaking that operates outside the democratic structures of the country. For this reason, the decision as to what matters a harmonization commission should deal with should be made in most cases by senior elected politicians who are not only likely to have an appreciation of the need for harmonization, but are also in a position to assess the chances that harmonization proposals will be accepted in one form or another by the legislative bodies of which they are members.

It is now common practice for federal and provincial Cabinet ministers responsible for specific aspects of government in their jurisdictions to meet on a regular basis to discuss common problems and interjurisdictional cooperation. A meeting of ministers could provide the forum in which decisions are made to pursue harmonization of programs, policies and the legal structures for their implementation. If change in the law is required, the ministers might decide to refer the task of developing model legal structures for implementation of harmonization policies to a harmonization commission or to some more appropriate organization. Alternatively, the decision as to what measures are required to implement the resolutions of the ministers might be left to a committee of deputy ministers.

Cabinet ministers are not the only people who are well suited to identify a need for interjurisdictional harmonization of law. A harmonization commission should be empowered to undertake studies on its own initiative or at the request of the Chief Justice of Canada, the chief justice of any province or the Canadian Bar Association. However, the council of ministers of justice should be given the power to veto any proposal for a study that comes from one of these sources.

The harmonization commission would be composed of representatives from all jurisdictions in Canada. These representatives would be people who could be expected to have influence in their jurisdictions when the question arose as to whether or not proposals for harmonization are to be adopted. All deputy attorneys general and chairpersons of law reform agencies should be ex officio members of the commission. A set number of delegates from each jurisdiction would be appointed for fixed terms by the lieutenant governor in council or the governor general in council as the case might be. A set proportion of delegates from each jurisdiction would be drawn from outside the civil service.

When a study of an area is undertaken, unless the meeting of ministers or committee of deputy ministers has specified the approach to be used, the decision would be made by the commission as to the most appropriate manner for carrying it out. Two options would be considered. A study could be referred to a single provincial law reform agency or to two or more law reform agencies acting cooperatively. The usefulness of law reform agencies in this way would be contingent upon changes in the legislative mandates and reporting procedures of most of them. The second option open to the commission, and one which under current circumstances is most likely to be selected, would be to create a committee composed of commission members. The committee would have to be given the power and resources to obtain expert advice from outside sources, contact interested persons, invite submissions and conduct hearings.

The committee would prepare a report for submission to the harmonization commission which would consider it and, where appropriate, publicize its contents and take measures to elicit public response to it. If necessary, the report would be referred back to the committee with instructions to amend it to reflect public and commission reaction to it. The report in final form, after approval by the commission would then be passed on to the meeting of ministers.

Harmonization studies undertaken on the initiative of the commission or arising out of proposals put forward by the judiciary or the Canadian Bar would be dealt with in the same way, with the exception that final reports would be presented to each provincial government by its representatives on the commission.

Where appropriate, the committee of the commission which prepared a report would act as an advisory body to any jurisdiction which decides to implement a harmonization measure put forward in the report. The permanent secretariat of the commission would monitor and record the extent to which harmonization proposals are accepted by jurisdictions, and would have the mandate to inform the appropriate meeting of ministers of the need for change or replacement of particular harmonization measures.

The model described in the preceding paragraphs, in addition to involving senior elected officials in the harmonization process, would hand to senior civil servants and formally appointed representatives from participating jurisdictions the obligation to ensure that studies are carried out with the necessary care and expedition. Commission committees would have sufficient resources to obtain needed expertise and research assistance. Another significant feature of the model is that ample opportunity would be given for public involvement in the process. The model would require that most reports be given public exposure, and opportunity would be available for public response.

Harmonization, not uniformity of law, should be the primary goal of the proposed commission. This would be reflected in the flexibility the commission would be given with respect to the range of measures it could recommend in order to effect harmonization. The commission might recommend model legislation, or decide that policy guidelines and statements of principle are sufficient to ensure the desired level of harmonization. It might go beyond legislation and deal with administrative structures. It might present models for specific structures or recommend that senior government administrative officials be instructed to meet and explore the possibility of having coordinated activity and parallel administrative structures in all jurisdictions. There might well be situations where the commission concluded that harmonization of law was not an adequate response to the difficulties being encountered and that some form of constitutional restructuring was required. In such cases, the report produced by the commission would so indicate.

There appears to be widespread agreement that new approaches to harmonization of law in Canada are needed. Since the ultimate decision as to whether or not harmonization of a particular area of law is to be undertaken is a political one, it is necessary to adopt approaches that permit greater involvement by elected politicians in the process. This alone is not enough, however. Mechanisms must exist through which political decisions can be implemented. A properly organized and adequately funded harmonization commission would be able to provide expertise to develop the legal structures necessary for this purpose. In addition it could facilitate greater public involvement in the harmonization process, thereby reducing the elitist, non-democratic aspects of it.

Note

This paper was completed in October 1984.

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Interjurisdictional Harmonization of Consumer Protection Laws and Administration in Canada

William A.W. Neilson

Introduction

The purpose of this paper is to analyze the connection between federalism and consumer protection legislation in the past 20 years in Canada. In particular, we will identify the several interjurisdictional legislative models that have emerged in the Canadian experience to produce a range of consumer protection measures across Canada.

We will concentrate on federal-provincial relations in the areas of consumer credit, debtor assistance and deceptive trade practices. These topics are examined in the first three sections of the paper. We adopt a chronological approach to federal-provincial dealings on these three issues, examining how the conduct of intergovernmental relations has evolved over the past 20 years. This is followed by a section describing and assessing seven approaches that have emerged as models for federal-provincial relations in consumer affairs. This section concludes with observations on the implications of these developments for legislative harmonization and for the Commission's mandate. Finally, in an appendix, we draw some comparisons with another federal system, Australia.

By way of overview, we acknowledge the historical strength of legislative initiatives by one or more provincial governments. The potential for chaos arising from this diversity of regulatory authorship has been curbed, however, by three factors: the increasing readiness of provinces to consult with each other prior to the formation of hard legislative proposals; the tendency by the federal government to set national, or sometimes gap-filling minimum standards; and a greater propensity of both levels of government to consult with each other on a pragmatic, administrative level.

These various factors have had a steadying and restraining influence on the jurisdictional bias of much consumer legislation in the fields under discussion here. This has not been caused by the acceptance of a master design by the affected governments. Federalism does not work that way. While there is little doubt that the legislative landscape is uneven in spots and empty in others, the overall picture is one of tempered experimentation, quiet adjustment and administrative harmonization. Legislative

uniformity may not be that common, but neither are significant aberrations or outright conflict between laws or their administration in different jurisdictions.

Nevertheless, a principal regret is the continued lack of protection to consumers living in those provinces whose governments have persistently failed to support protective legislation granting needed rights and remedies to consumer buyers and debtors. Thus, a consumer's accident of residence will determine whether he or she has access to the Orderly Payment of Debts (OPD) provisions of the federal Bankruptcy Act, which are operative in those provinces that elect to take the scheme by way of delegation (the long-identified deficiencies of OPD are a separate matter). Similarly, four provinces remain without comprehensive trade practices legislation, and the marketing provisions of the federal Combines Investigation Act are an inadequate substitute.

It does not follow, however, that overarching national legislation is the answer. For one thing, the mere presence of legislation is a sham if adequate enforcement resources are not provided or if there is little political will to apply the legislation to the marketplace. Too often both phenomena happen in Canada. There may well be cases for legislated protection on a cross-country basis (particularly where there is clear constitutional authority and inadequate or non-existent provincial legislation); but the advantages of harmonization are rooted in sensitive legal design, patient collaboration, mutual trust and a sense of shared interest. Harmonization in a federal system works on a consensual and interdependent basis, rarely equates with legislative uniformity, and is frequently more attained at the administrative level than in the moment of statutory creation.

This is not a plea for the status quo or a statement of quiet resignation to the mosaic of consumer legislation now in operation in Canada. Indeed, as we will see, there is some danger that the present political complacency or lack of interest in consumer matters has seeped down to senior civil servants, with the result that interprovincial and federal-provincial contacts are becoming less and less frequent. Cutbacks, other priorities and an aversion to interventionist legislation have tended to reduce the incidence of enforcement and administrative contacts between the various jurisdictions. Recent efforts in the direction of collaborative research have also been reduced, and there is some danger of insularity returning to the shaping and administration of consumer protection laws in Canada. If these trends continue, the instructive aspects of recent experience would wither away, and the public at large would be the losers.

It will be observed that the emphasis of the paper is on federal-provincial relations in the development of consumer protection measures in areas of common interest. That experience has produced a remarkably rich and diverse series of arrangements by which legislative initiatives

frequently coexist. Nevertheless, the quest for uniformity and harmonization in our federal system more frequently starts at the interprovincial level. For our purposes, however, the significance of interprovincial harmony will become evident as we examine federal-provincial interaction where harmonization, if not uniformity, of legislation and programs is functionally feasible and constitutionally available.

In summary, Canada's recent record of interjurisdictional relations in the field of consumer protection provides a useful contribution to a more informed understanding of Canada's record in regulatory legislation. In turn, a better appreciation of this experience will shed light on the potential benefits and detriments attaching to the "harmony" and "diversity" approaches to regulatory authorship. Finally, recent interprovincial and federal-provincial administrative liaison on the three issues examined here may point to a path of pragmatic harmonization worthy of further inquiry and consideration.

The Regulation of Deceptive Trade Practices: Patchwork Federalism

In 1914, the exploitation of homesteaders by real estate vendors in the West prompted Parliament to add misleading advertising sanctions to the Criminal Code.[1] These provisions went through various amendments during their 55-year life in the Code, but in that time there was not a single reported case brought by the provinces in their administration of the provisions.[2]

In 1969, two years after the formation of the federal Department of Consumer and Corporate Affairs, the sanctions were transferred from the Code to the federally administered Combines Investigation Act[3], and active prosecution of the sections commenced. In 1975, after four previously unsuccessful attempts, the Department managed to secure passage of significant amendments to the misleading practices provisions.[4] With the exception of a civil damages provision,[5] the 1976 additions continue to focus on an approach based on criminal law. The provisions prohibit all types of misleading advertising and define a number of specific offences, including testimonials, promotional contests, bait-and-switch selling, ordinary price representations, and performance and efficacy representations. Separate sections deal with double-ticketing, pyramid selling and referral selling. This part of the Combines Investigation Act is administered by the marketing practices branch of the Department through a headquarters office in Ottawa, assisted by a limited number of staff in 13 field offices.[6]

The desultory attitude of the provinces to the regulation of deceptive trade practices was thrown over in the 1960s, when many of them brought in controls on the questionable aspects of consumer credit and the activities of automotive dealers and itinerant sellers. Then, in 1974,

Ontario and British Columbia led the way with their respective business practices[7] and trade practices[8] acts. The next year Alberta adopted similar legislation, followed by Prince Edward Island in 1977 and Newfoundland and Quebec in 1978.[9] At one time, similar steps were forecast in most of the other provinces, but the legislative front, except for a few amendments, has been quiet in the past five years, leaving Saskatchewan, Manitoba, New Brunswick and Nova Scotia without trade practices acts.

The Intergovernmental Dimension

The Interprovincial Aspect

The provincial trade practices acts (TPAs) are based on American precedents.[10] Each prescribes a "laundry list" of unfair or unconscionable and misleading or deceptive acts or practices. The statutes set up both civil and criminal consequences for firms or persons engaging in such practices. Private remedies may include declaratory and injunctive relief, rescission and exemplary damages. Public enforcement options normally include a cease and desist power, substitute actions on behalf of consumers, provincial criminal court proceedings, and agreements of voluntary compliance. The total enforcement package leans heavily on the considerable constitutional powers available to the provinces in this area and is designed to maximize the objectives of deterrence, compensation and efficiency.[11] The result is "an integrated sanctions network in which public and private law enforcement streams have been recognized and tapped for their respective contributions to the attainment of these objectives."[12]

It is important to note that the provincial TPAs, "although fundamentally similar, differ from one another."[13] The differences between the Ontario and B.C. statutes have been noted in detail elsewhere.[14] These variations extend to important points of coverage, publicity, consumer class actions, remedies in the face of unconscionable conduct, and substitute actions. By contrast, Prince Edward Island's TPA is a copy of the Ontario statute. The point for the present exercise is that the common legislative roots of the provincial TPAs have resulted in a considerable similarity of approach; even so, interesting and, at times, significant differences in definition, coverage and remedies must be acknowledged in any canvass of provincial efforts. If the end product is not legislative uniformity among those provinces with TPAs, it can be argued that we have achieved a high degree of legal harmonization.

As a result, depending on one's province of residence, there are one or two levels of legislative protection against unfair or deceptive business practices. The federal measures, as supplemented by the 1975 amendments, apply in all provinces, and in six of those provinces a separate provincial TPA is also in effect. In the words of a 1976 report,

> It is certainly arguable that business would have an easier time coping with trade practice laws across the country if they were uniform. . . . This may be unrealistic in a federal state. It may not even be necessary. It would certainly not, however, be harmful if the result could be brought about.[15]

We turn now to the attempts of the federal government, beginning in 1977, to construct a "constitutionally permissible and . . . politically acceptable" national trade practices strategy; these efforts were strongly influenced by the published reports of several independent consultants. An examination of federal efforts, as well as federal-provincial dealings with regard to a national trade practices strategy, provide an instructive reminder of the realities (and opportunities) of lawmaking in the exercise of concurrent powers after major provinces have already made substantial legislative investment.

Federal Proposals and Provincial Responses

In 1976 two reports were published by the federal bureau of competition policy of the Department of Consumer and Corporate Affairs. Each was prepared by independent experts. The first, *Proposed Policy Directions for the Reform of the Regulation of Unfair Trade Practices in Canada*,[16] made detailed proposals for a model federal enactment and was heavily influenced by the provincial statutes, particularly the TPA in British Columbia.

The second report was prepared by Professors Ziegel and Cohen under the title, *The Political and Constitutional Basis for a New Trade Practices Act*.[17] The authors concluded that: the provincial TPAs were based on a sound constitutional footing and would likely be allowed to exist under the concurrency doctrine if a federal TPA were enacted, even though there would likely be "substantial overlap" between the two sets of legislation. They observed that legal coexistence is commonplace in a federal system but works best if a close working relationship can be created between the two levels of government. Cooperative federalism thus invites the non-TPA provinces to enact such legislation "and to administer it to the limits of their resources." It does not follow, however, that the federal government ought to exit from the TPA area, particularly with reference to its interprovincial aspects. Based on the 1976 jurisprudence, Ziegel and Cohen concluded that a federal TPA had best concentrate on interprovincial trade practices based on "the double deployment of the criminal law and trade and commerce powers." The new federal TPA would have two parts. The first would retain "the existing criminal law formula without territorial restrictions." The other part would really be a federal version of a model TPA restricted to interprovincial practices. In theory, the advent of a federal TPA would create the possibility of "an integrated form of administration," perhaps even an "interdelegation of powers between the federal government and individual provinces." How-

ever, Ziegel and Cohen believed that the prospects for this "integrated form of cooperative federalism" were minimal. In the short run, it would be more realistic to concentrate on consultative federalism through attempts to achieve greater uniformity in legislation, information and personnel exchanges, the establishment of a federal-provincial secretariat (leading eventually to a coordinator of federal-provincial affairs) and "the establishment of criteria for the territorial classification of practices and their allocation for investigative and enforcement purposes."[18]

With the two studies in hand, federal officials moved quickly. A major effort was made at the May 1977 meeting of federal and provincial deputy ministers of consumer affairs. The purpose of the meeting was to prepare an agenda for the meeting of ministers to be held the following July. The assistant deputy minister for competition policy announced the intention of the federal department to propose a federal TPA to the minister.[19] The TPA would be heavily influenced by the model statute proposed in the Trebilcock report, and a federal tribunal would be established to pass trade regulation rules of general application. There might also be rules that would be product-, industry- or practice-specific. The same tribunal would be empowered to issue cease and desist orders, require corrective advertising, order restitution, and require the return of unjustly obtained gains. It would not have the jurisdiction to award damages. A director would be appointed to enforce the statute and would be the only enforcement authority allowed to appear before the tribunal.

The federal official also proposed that the provinces confine their activities to provincial or local transactions; the federal government would do the same with respect to "transprovincial transactions." In practical terms, the federal director would monitor the national practices of national firms, provincial directors would be concerned with the local practices of local firms, and arrangements would be worked out to handle the local practices of national firms. Bilateral arrangements would be worked out with non-TPA provinces should they wish "to pick up" the new federal legislation to handle local cases. In time, national minimum standards would be applied through a combination of separate federal and provincial enforcement programs.[20]

The proposal went nowhere. Part of the problem was that it was not a proposal but rather advance notice of an irrevocable decision made at the most senior levels in the Department.[21] It was not evident whether a ministerial commitment had been made to the plan, but in any event, it eventually transpired that federal Cabinet support was not forthcoming. Part of the explanation may be traced to the still-fresh memories of provincial complaints over the methods of federal "consultation" employed with the ill-fated Borrowers and Depositors Protection Act (BDPA),[22] which is examined in a subsequent section. The lessons of that exercise apparently had not been fully appreciated, at least as they

applied to an area of substantial provincial legislative activity. This reality, the history of the BDPA would suggest, must temper both the substance and the process of any subsequent federal attempt to establish a national regulatory presence, however desirable national standards might be.

Nor were the federal plans helped by the simultaneous announcement that the Department was to shut down its Box 99 consumer complaint facility as a cost-saving measure. The service was widely used by consumers, and there was considerable apprehension by the provinces that they would be left with the legwork of local complaints, high costs, minimum challenge and little else. The federal TPA proposal by comparison would be much more costly and would carry a high risk of exacerbating federal relations with TPA provinces. Finally, there was much skepticism about the meaning and practicality of the proposed system for the division of "local" and "transprovincial" cases.

The federal proposals were characterized by their authors as an important contribution to the rationalization[23] of trade practices legislation, but they attracted little provincial support. The subject did not appear in the communiqué issued at the conclusion of the minister's meeting in July 1977. Research on the contents and constitutional implications of a civil-oriented federal TPA continued within the Department into the early 1980s. But any momentum or whiff of political support for a federal statute had receded by 1978, and moves in this direction were not included in (or even suggested for) Bill C–29, given first reading on April 2, 1984, which proposed amendments to the non-marketing provisions of the Combines Investigation Act.

Implications of the TPA Experience

The past ten years have yielded a very mixed picture. Six provinces have TPAs that are fundamentally similar but differ in some important details. Their records of enforcement differ even more.[24] The marketing provisions of the federal Combines Investigation Act have been strengthened by the amendments that became effective in January 1976. The act has been prosecuted with considerable vigour, and record fines have recently been imposed.[25] The regional offices of the federal Department are active in the enforcement process. Ironically, although the act has national application, the majority of enforcement proceedings involve local firms and local practices.[26]

Interviews confirm that provincial officials in TPA jurisdictions and their federal counterparts are in regular contact. According to the 1981 Annual Report of the federal Department, "regional managers [in the six TPA provinces] maintain the necessary liaison with provincial authorities responsible for consumer protection and trade practices matters."[27] Available evidence confirms that duplication or overlap of cases rarely

occurs in practice. This is partly explained by the observation that "there is more than enough for everyone." Another explanation points to the informal but rather effective working relationships that have emerged between the respective regional staffs. These contacts tend to minimize the risk of duplication fairly early in the investigative process.

The trading (perhaps too strong a term) of cases appears to have little continuing or primary connection to the national-local dichotomy. Instead, when faced with a choice, the practice seems to be that the provincial authority will favour those cases having a transactional context in which the supplier's representations caused losses for consumers, and questions of redress figure prominently in enforcement priorities. The federal cases, on the other hand, tend to reflect the criminal law origins of the legislation and concentrate on print media advertisements with a keen eye on questions of intent and the probable size of the fine. Both patterns for choosing cases are quite consistent with the design of the respective statutes. The field staff working relationship helps to explain the relatively low incidence of duplication or overlap in those provinces in which a TPA is in force.

We may conclude that a certain equilibrium has been achieved in the area of trade practices law. There are two tiers of legislation in six provinces and a single national tier in four provinces. Senior federal and provincial officials no longer meet on a regular basis to discuss issues of common concern, and any discussion of rationalization has long since been dropped from the intergovernmental agenda.

Serious suggestions once made to promote clarity, greater efficiency and better minimum standards have been pushed aside. Those suggestions included[28]:

1. agreements between governments on the division of responsibilities before legislation is passed, much in the manner of the experience in agriculture;
2. adoption of conditional legislation "whereby a certain conduct or practice is not prohibited if it is permitted or sanctioned by the other level of government," as now found in the 1976 Combines Investigation Act amendments dealing with pyramid selling and referral selling;
3. an approach based on the selective proclamation of a federal statute, whereby a province could ask that the measure be brought into force within its boundaries; and
4. the adoption of "mirror" legislation by the two jurisdictions, under which they would pool their constitutional authority and vest powers in a single regulatory body.

Another area of potential movement toward improved coordination and cooperation is administrative arrangements. Mention has already been made of the present informal contacts used to manage potentially overlapping cases. More formal attempts to distribute these cases failed,

perhaps, in part, because they were too clearly tied to threatened federal legislative initiatives. Rather elaborate proposals for coordination and a division of regulatory responsibility were being discussed in the dying days of the Borrowers and Depositors Protection Act in 1977.[29] These discussions collapsed with the demise of the bill and have not been pursued in either the consumer credit or the trade practices area in the past six years.

Mechanisms for improving federal-provincial coordination and cooperation in the consumer protection area are reviewed in more detail in the final chapter of this paper. Our study of the trade practices experience provides a sobering reminder of the particular challenges to harmonization posed by the exercise of concurrent authority in a federal system. In the best of ordered worlds, there ought to be either advance agreement on the division of responsibilities between the two levels of government or, as a second choice, arrangements for the coordination and rationalization of regulatory activities to minimize overlap and duplication. The existence of concurrent authority places a special value on the wise deployment of the tools of collaborative federalism. Steps in this direction would improve the prospects for harmonization at both the legal and administrative levels.

Unfortunately, the intergovernmental chemistry required to take these steps in the trade practices area was missing at the crucial time. That is not to say that yesterday's failure denies success tomorrow, but there is little evidence that the political and market dynamics will exist in the foreseeable future to change the present situation to any measurable extent. Nor, one might add, is there persuasive evidence that the present mixed picture constitutes a significant barrier or impediment to the achievement of a better economic union in Canada.

Debtor Assistance and the Orderly Payment of Debts: Harmony Through Delegation

The advent of credit purchasing has brought with it many material benefits to Canadians and not a few borrower casualties. Across Canada, legislators have responded in at least two principal ways. First, where it was felt that lenders and retail sellers were overreaching, restrictions were introduced on the conditions for repossession, the clear disclosure of all borrowing charges was mandated, and standard credit contracts were required in some provinces.[30]

The second area for initiative came in the form of debtor assistance programs and legislation. These steps took place at both the federal and provincial[31] levels in the absence of more significant structural interventions in the credit system (for example, through subsidized loans to marginal borrowers or the development of government lending facilities, both of which were discussed seriously in the early 1960s).[32] Manitoba (in

1932), Quebec and Newfoundland, for example, had the first legislation extending protection to overcommitted debtors, much in the manner of the present Part X of the federal Bankruptcy Act.[33]

Part X is designed to provide a simple procedure for the orderly payment of debts: debtors who are unable to meet their obligations as they come due may apply to a court clerk to fix amounts to be paid to the court and distributed pro rata among the creditors until they are paid in full. In 1959 the Supreme Court of Canada held the proposed Alberta legislation to be ultra vires,[34] a result that put the other provincial schemes in jeopardy and led to the enactment by Parliament in 1966 of the present Part X of the Bankruptcy Act.

Selective Proclamation

It would be a mistake, however, to assume that this federal initiative meant that the scheme for orderly payments by a consumer debtor now applied across Canada. Part X was designed from the start to repair the damage caused by the 1959 constitutional ruling and nothing more. As a result, its provisions are made available by way of delegation from the federal government to those provincial governments who request the transfer of the authority. In return, the Superintendent of Bankruptcy requires the submission of annual reporting data to ensure that the administration of Part X in the participating provinces is proceeding properly within the terms of the act. These are not difficult requirements, and any sense of federal control or intervention is notable by its absence. Those provinces now number seven but unfortunately do not include either Quebec or Ontario. As a 1970 federal committee report observed,

> One of the defects of Part X is that it only applies to the debtors residing in the provinces in which the provincial government concerned requests the part to be proclaimed in force. Until it is proclaimed in force in all provinces, all debtors in Canada do not have the same opportunities for their relief and rehabilitation.[35]

Part of the provincial reluctance may be explained by the recognized deficiencies of the federal scheme, including the omission of business-related debts, all secured debts and Crown claims from its coverage. In addition, there are no provisions for summary relief from questionable transactions or for the easy valuation of deficiency claims.

The problems with Part X were documented in the 1970 report, and substantial improvements in the treatment of overcommitted small debtors have been proposed in successive bills introduced since 1975 to overhaul the bankruptcy legislation. Despite detailed hearings and reports by the Senate's Standing Committee on Banking, Trade and Commerce, and despite five further bills that have been introduced since Bill C–60 in 1975, we are still awaiting the enactment of a new bankruptcy

code. As one commentator remarked, "a long period of gestation for new legislation is unfortunately not unusual for the federal Parliament, although the travails of the bankruptcy bill must surely be close to a record."[36]

The reasons for delay do not appear to relate to changes in the orderly payment of debt provisions. Generally speaking, there has been provincial support for the principal features of these federal proposals, a fact that augurs well for their coverage and administration should the latest measure, Bill C–17 (given first reading on January 31, 1984), ever come back to a new parliament for consideration.

Parliamentary Impasses

The extraordinarily tortuous path of consumer-oriented bills through Parliament for most of the 1970s and thus far in the 1980s must be a matter of concern, if only to the extent that obstructions and delays undermine the adoption of national programs and standards that would assist the cause of legal harmonization. This is particularly regrettable in the case of consumer debt arrangements, where national standards are available on a voluntary, delegated basis to participating provinces.

In terms of legal design and political viability, this is collaborative federalism at its best. The results admittedly may make for gaps in the availability of the federal measures, but we ought to acknowledge the view that the chance for diversity and experimentation is left in those provinces whose governments choose not to adopt the federal provisions. The system for consumer debtor counselling does operate differently in Ontario and Quebec, and both provinces continue to favour their own legislative schemes for assistance to overcommitted consumer debtors.

The New Brunswick – Canada Arrangement

An interesting development has just occurred in New Brunswick. Until recently the province had no debtor assistance program; nor has it sought the authority available to provinces under Part X of the Bankruptcy Act. In late 1983, administrative arrangements were concluded between the Superintendent of Bankruptcy and New Brunswick to establish a Consumer Debtor Program based upon a system of arrangements with creditors similar to proposals available under Part III of the present act.[37] The intergovernmental arrangement is instructive; it is a useful collaborative precedent and shows flexibility in overcoming the limitations of the Bankruptcy Act in dealing with the situation of the small debtor.

Historically, "while there is no reason, in principle, why such a debtor could not make a proposal under Part III of the Act, in practice the costs and particularly the fees of a private trustee are beyond his means."[38] The new program in New Brunswick recognizes these problems. To coun-

teract them, the Superintendent, with the active cooperation of the province, approached major consumer credit grantors (most headquartered in Toronto) and secured their support for the program. To this end, New Brunswick apparently has obtained voting letters from these creditors by which they confirm their acceptance of all proposals made within the terms of the consumer debtor program. Major province-based creditors have apparently done the same.[39] These standard or bulk acceptances may be withdrawn should a creditor object to the ratification of a particular proposal, but in general the scheme is clearly premised on the absence of a formal meeting of creditors in most cases and the standard filing of consents.

The fast-track features will obviously reduce costs. Similar savings will occur in the fees of trustees whose cooperation in various parts of the province has been secured. When consumer debtors make application, they are interviewed by trustees to ascertain the nature of the indebtedness and to determine the most appropriate solution. If a proposal is decided upon, the trustee draws it up, provides counselling as to the debtor's duties, and may recommend and supervise rehabilitative measures. The proposal is filed with the Official Receiver, and the relevant documents are sent by the trustee to the creditors, together with a notice of meeting as required by s. 33 of the Bankruptcy Act.

As noted previously, meetings of creditors will be the exception. It is then expected that the trustee will apply to the court for approval of the proposal and then will supervise the debtor's payments.

New Brunswick for its part is to provide information to the public about the program, make arrangements with and evaluate trustees, secure voting letters from credit grantors, and appoint a program coordinator. Administrative guidelines, program forms and ongoing advice have been provided from the outset by the office of the federal Superintendent of Bankruptcy. The first information pamphlet states that the

> . . . provincial Department of Consumer and Corporate Affairs operates a program in which a debtor can obtain the services of a trustee in bankruptcy to handle one of the two following parts of the Bankruptcy Act, a consumer proposal or an assignment in bankruptcy.

The New Brunswick – Canada arrangement serves as a reminder of the residual capacity in our federal system for bilateral innovation and adjustment. The arrangement has been worked out in the face of outmoded legislation and, indeed, without any formal delegation of authority from one level of government to another. While it would not be accurate to conclude, on the basis of the New Brunswick – Canada arrangement, that it can easily be adopted by other non-Part X provinces, the collaboration is further evidence of the lengthy record of administrative cooperation and non-intervention practised by the Superintendent in dealings with the provinces.

However, a new Bankruptcy Act along the lines of Bill C – 17 (the latest proposal for change) is a condition precedent to any substantial improvement in the national coverage of a common legislative framework for provincially administered payment programs for consumer debtors. In many respects, the present model of delegated authority has succeeded in laying the basis for better, locally managed consumer debtor programs. This is not to suggest that every province will wish to participate under the new act or, if they do, that they will commit sufficient resources to discharge their responsibilities properly. Those are matters of speculation and government priorities beyond our terms of reference.

Concluding Observations

There are two levels of legislative activity in Canada relating to debtor assistance and the orderly payment of debts. Apart from fairly standard provincial laws dealing with secured creditors, credit disclosure requirements, priorities and debt collection practices, most provinces direct or recognize the operation of debtor counselling programs and a few, on their own or in collaboration with social agencies or the credit community, operate payment plans for overcommitted consumer debtors. Nonetheless, while these provincial operations exhibit some similarity of approach in detail and philosophy, there is little evidence of legislative uniformity or consistent treatment as between jurisdictions.

Under the aegis of the federal Bankruptcy Act, however, a uniformity framework has been extended to six provinces that have chosen to have the delegated authority for the orderly payment of debts proclaimed within their respective boundaries. In another case, a more flexible and less formal adaptation of the Part III provisions is expected to breathe new life into that moribund part in its application to small debtors in a province that, until now, has not had its own debtor program or Part X machinery.

The overall picture is one of varying provincial commitment within the rubric of federal legislation whose necessary reforms have been held up in Parliament for ten years. If those changes are adopted, there is reason to believe that the record of quiet delegation tied to a federal law would continue and perhaps might even be extended.

In summary, national standards for debtor assistance and the orderly payment of debts (OPD) arose from a constitutional rescue to resuscitate provincial programs born in the Depression. The voluntary nature of provincial participation continues to deny many Canadians access to the benefits of the scheme but, to be fair, the gaps reflect the historical origins of the program, which were tied to identified provincial priorities. The result is legal accommodation between the two levels of government that has resulted in imperfect coverage for many debtors. The question left is

whether this selective, collaborative model of federalism takes the interest of consumers sufficiently into account even though the constitutional authority of the federal government to operate a national OPD plan is secure. Perhaps the OPD record suggests that compulsory national standards are not always the most appropriate policy choice in a federal system.

Consumer Credit Law Reform: Conflict and Accommodation

In this section we review the more prominent federal and provincial initiatives in consumer credit legislation since the 1960s. Again, we are concerned less with the intricate points of constitutional leverage and more with the realities of federal-provincial accommodation in an area of importance to consumers and financial institutions alike.

Essentially the story is one of galvanized confrontation between a majority of the provinces and the federal government in 1976–77, prompted by the latter's support for omnibus credit legislation at the federal level. The federal proposals were made without adequate consultation with major interest groups, including the provinces and, within a year of their introduction, the bill's elements (some of which were meritorious if flawed in detail) were mortally wounded by the separate attacks of provincial consumer affairs ministers and the consumer finance industry.

The fallout from these incidents has tempered and tailored federal-provincial relations in consumer matters in the late 1970s and early 1980s. A closer analysis of the subject is in order if similar conflicts are to be avoided. We must also investigate the implications for harmonization arising from the subsequent joint commitment of the provinces and the federal Department of Consumer and Corporate Affairs to coordinate their legislative intentions and consumer protection programs.

Constitutional Parameters for Provincial Initiatives

The issue of consumer credit legislation has been increasingly significant in the last three or four decades. Modern life runs on credit in its many forms: chattel mortgages, time sales, personal loans and credit cards. Some low-income people also become involved with income tax rebaters or loansharks. Advanced technology and the increasing use of credit cards and electronic funds transfer systems will tend to make the use of cash the exception rather than the rule.

There are a number of areas in which the consumer may be subject to exploitation, such as unconscionable terms, failure to disclose charges, prepayment penalties, usurious rates and unwarranted repossessions. Recognition of these abuses has meant that regulation has long been accepted as necessary in the area.

In a federal state a preliminary argument is raised that we must identify the appropriate jurisdiction before beginning the task of legislative regulation. It will become evident that this is not always an easy task (nor perhaps the best approach; our system frequently rests on functional concurrency, which suggests we really identify the problem, design the law and only then worry about the constitutional niceties).

While some credit transactions are purely provincial in scope, in many cases they are interprovincial, national or international in nature. Credit institutions often operate beyond the borders of one province. Credit cards are issued by national banks, retailers and credit companies. Simple consumer credit transactions often involve parties in different provinces. This would seem to be an area where consistency would be advantageous, both to the credit institution that has to do business in different provinces, and to the consumer who deals with different types of creditors.

Because of the legitimate interests of both federal and provincial governments, and the constitutional jurisdiction of both in at least some aspects of the consumer credit field, this is an area where rationalization and harmonization of legislation and its administration are desirable goals. In addition, the transborder aspects would seem to call for a federal leadership role. However, the federal government was relatively inactive in the area of consumer credit legislation in the 1960s and early 1970s, and the provinces used the openings available in the Constitution to step into the area.

Between 1955 and 1963, Alberta and Manitoba initiated unsuccessful efforts to enact legislation requiring credit charges to be stated in terms of the effective interest rate. By 1966, Manitoba and Saskatchewan provided for a cooling-off period for sales involving itinerant sellers. Most provinces had some kind of unconscionable transactions legislation providing relief for consumers. Quebec and Nova Scotia had drafted bills covering vendor and lender credit. Nova Scotia had passed legislation licensing and supervising credit grantors. Manitoba, Nova Scotia and Ontario had produced reports on consumer credit. Quebec was planning to introduce consumer protection legislation dealing with a number of consumer credit issues.

These activities continued well into the 1970s with the passage of legislation requiring disclosure of the cost of credit, the enactment of trade practices statutes, the introduction of registration requirements for mortgage brokers, the adoption of debtor protection measures, and the regulation of business (including credit grantors') advertising.

Provincial jurisdiction in the area of consumer credit resides basically under two heads of power, property and civil rights and matters of a local and provincial nature. Consumer credit transactions invariably involve contracts, and provincial control over contracts has been clearly established.

Federal jurisdiction might arguably be supported on the basis of several heads of power. It is, however, too simple to argue that federal jurisdiction over banks and banking or interest establishes federal paramountcy in consumer credit law. The issue is not so clear-cut, and while certain aspects of consumer credit clearly fall under federal heads, it is quite possible that general regulatory legislation would be beyond federal powers if it extended beyond federal institutions.

The power over banks and banking gives the federal government broader power to regulate banking institutions and banking business, and thus most aspects of consumer credit transactions involve banks.[40] This does not necessarily mean that financial institutions incorporated under provincial powers, and their contracts, may be federally regulated. It is possible that such legislation might be supported on the basis that the business of these institutions is banking, or that their regulation was a necessary incident to the effective regulation of banks; alternatively the federal government might be able to restrict banking activities to federal banks and thus coerce provincial financial institutions into accepting federal jurisdiction.[41]

The scope of the interest power is somewhat unclear, due to varying definitions of interest given by the courts. In the *Tomell Investments* case[42], the majority of the Supreme Court of Canada held that interest means day-to-day accrual, but "legislation in relation to additional charges is 'a valid exercise of ancillary power' " with relation to interest.[43] The minority did not rely on the ancillary doctrine, but found that legislation regarding penalties imposed by lenders was a valid exercise of the interest power itself. There is still uncertainty as to whether the federal government under the interest power can regulate consumer credit transactions and the components of such transactions.

Other federal powers that might be used to regulate certain aspects of consumer credit include the powers over bills of exchange and promissory notes, bankruptcy and insolvency, national works and undertakings, specific industries (which might, for example, be used to control advertising on radio and television), the postal service, and the federal general power. These are all relatively limited in scope and would be unlikely to support a general regulatory scheme.[44] The two heads of power that would give the strongest support to such legislation are the criminal law power and the trade and commerce power.

The criminal law power is probably capable of sustaining such legislation, as it has been given a fairly broad interpretation:

> To support particular criminal legislation it is probably sufficient that Parliament regards the conduct being dealt with as a public wrong and attaches penal consequences as a result.[45]

Some of the public purposes that fall within criminal law include public peace, order, security, health and morality.[46] The Combines Investigation Act, for example, has been upheld under the criminal law power. This power may not, however, be particularly suitable for regulating consumer credit transactions. It is limited in several respects. For example, a regulatory scheme is not considered to be criminal; thus investigation is permitted but regulation is not.[47] Also, civil remedies may not be able to be created under this power, independent of penal enforcement.[48] And the evidentiary standards imposed by criminal law may be higher than appropriate.[49]

These types of problems do not exist with regard to legislation enacted pursuant to the trade and commerce power. Traditionally the trade and commerce power has been held to include regulation of interprovincial and international trade, regulation of trade affecting the dominion, but not regulation of particular trades within a province. The general trade and commerce power (regulation of trade affecting the dominion) has been assumed to exist but, until recently, had been applied to validate federal legislation in only two cases. It is that branch of the definition, in combination with the interprovincial aspect, that might form a basis for supporting a large-scale federal regulatory scheme.

The general trade and commerce power may be in the process of being resurrected, based on the minority's concurring decision in the recent *Canadian National Transportation* case.[50] This case dealt with the power to prosecute under the Combines Investigation Act. It was argued that the act was based on the criminal law power and that only the provinces could prosecute criminal offences. The majority of the Supreme Court of Canada held that, even if the act was criminal law, federal officials could prosecute. It was not necessary to determine whether the act could be sustained under any other head of power.

The minority did consider the latter issue and found that the act was supportable under the general trade and commerce power. Their reasons, which were written by Mr. Justice Dickson (as he then was), accept that the general trade and commerce power should be given a restrictive reading, but not so limited as to render the power inoperative. In his opinion, the reason why the federal government cannot regulate a single business or trade in a province is that this involves an exact overlapping, and thus a nullification of provincial jurisdiction. It makes no difference whether Parliament attempts to pass this kind of law to apply to all provinces rather than just one.

> However, it is qualitatively different to enact general legislation aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises. . . . The focus of such legislation is on the general, though its results will obviously be manifested in particular local effects any

> one of which may touch upon "property and civil rights in the province." Nevertheless, in pith and substance such legislation will be addressed to questions of general interest throughout the Dominion.[51]

The test may be difficult to apply, but Dickson's opinion provided some indicia, including, most importantly, a situation in which the provinces could not pass the particular type of legislation. Regulation of interprovincial competition is the type of subject matter that cannot be accomplished by provincial legislatures; thus if the federal government were not capable of doing it there would be a gap in the division of powers, and in his opinion there should be no such gaps. Another indicium is whether a failure to include a province or locality would jeopardize the successful operation of the scheme in other parts of the country. Others include the presence of a national regulatory scheme and an overriding concern with trade in general rather than the aspects of a particular business. If the Dickson test is accepted,[52] it may well provide a sound foundation for federal jurisdiction to enact legislation establishing a scheme for regulating many aspects of consumer credit transactions.

This does not mean that such legislation would necessarily be politically feasible, but the decision gives legal support to federal initiatives in the consumer credit area. In retrospect, however, these constitutional considerations came too late to alter — at least for the foreseeable future — the intergovernmental dynamics of legislative initiatives in consumer protection matters. The reasons for this assessment will become more evident in the rest of this chapter.

Federal Initiatives: The BDPA

The deficiencies in consumer credit legislation had been a matter of federal concern since at least 1960. A private member's bill was introduced in the Senate that year, and over the next eight years there was regular activity, including discussion in both chambers, a Royal Commission on Banking and Finance (Porter Commission, 1964), a Special Joint Committee on Consumer Credit (which produced the Croll-Basford Report, 1967), and public hearings. During the 1960s there was little federal legislation in the area of consumer credit, although a number of provinces had started to legislate in this area.

When the Department of Consumer and Corporate Affairs was created in 1968, the minister sponsored amendments to the Small Loans Act, the Interest Act, and the Bills of Exchange Act, but ultimately was successful in only the latter case. For the next few years there was little constructive federal activity regarding consumer credit, although a position paper was produced by the director of the Consumer Research Branch.

By 1974 it was obvious that federal legislation was outdated and inadequate. Numerous representations had been made to the federal government, requesting that the situation be remedied, but they had met with little success. The problems proliferated as inflation rates rose, and political pressure increased. The provinces were taking the lead, stepping in with new legislative measures in the face of federal inaction. The combination of federal and provincial laws, some outdated, others inconsistent, made it highly desirable that there be some clarification of the law. In short, consumer credit had become ripe for careful federal-provincial coordination and collaboration in legislative reform.

During the 1974 election campaign, the prime minister raised the Consumer and Corporate Affairs research paper to the status of a white paper. When the government was re-elected, the new minister treated the consumer credit issue as a high priority. The result was omnibus legislation, often differing considerably from earlier proposals and recommendations.[53] On October 17, 1976 first reading was given to the Borrowers and Depositors Protection Act (BDPA) bill.

The BDPA was intended to improve the flow of credit-related information by requiring full disclosure throughout the whole process; to eliminate unnecessary complexity by standardizing basic concepts; to reduce excessive credit rates through the concepts of "unwarranted rate" and "criminal rate;" to rationalize federal legislation by replacing the Small Loans Act, the Interest Act and the Pawnbrokers Act; to create a uniform standard of protection relating to all lending to individual borrowers by any lender; and to create a national data base on consumer credit.[54]

The bill came under immediate attack, particularly from the provinces and financial institutions. The federal government had in fact chosen to ignore cautions against introducing the bill until these constituencies had been consulted more adequately.

In December, the BDPA was sent to the Senate Committee on Banking, Trade and Commerce and later to the House Committee on Health, Welfare and Social Affairs. The Department formulated numerous amendments (which often bore little relation to the representations received or to the Senate committee's recommendations).[55] The Senate committee recommended that the bill be redrafted after extensive consultations. The House committee had not completed consideration of the proposed amendments by the time Parliament was prorogued.[56] The BDPA died on the Order Paper, and a subsequent attempt to resurrect it in the form of a Fair Credit and Savings Act was unsuccessful. The omnibus approach was then abandoned.

The criticisms that were levelled against the BDPA included the following: it ignored business realities;[57] it underestimated the technical problems underlying many of its provisions;[58] its scope was too broad;[59] the

imbalance in resources between consumers and the finance industry resulted in too much weight being given to the representations made by the industry;[60] it "provided for an enormous administrative bureaucracy in many cases totally duplicating existing provincial structures";[61] its constitutional validity was questionable; it often overlapped or conflicted with provincial legislation; and its development had not involved consultation with the provinces. These criticisms were in addition to the more specific ones aimed at particular provisions of the bill.

The question of federal consultation, or the lack thereof, is of particular interest to this discussion. We will focus first on the federal government's consultation with the provincial governments. First, an historical note. After the first federal-provincial meeting of consumer ministers in 1969, a communiqué was issued stating that credit disclosure legislation had been reviewed and that the Interest Act would be reviewed in respect of its suitability to modern lending practices. The communiqué went on:

> It was agreed that any revision of the Interest Act would require full federal-provincial consultations well in advance and in detail.[62]

With the BDPA the federal government intended to replace, not merely revise, the Interest Act. However, there was very little consultation with the provinces in advance, or in detail. The bill was prepared in secrecy, with no discussion paper or draft produced for feedback prior to federal commitment to the proposals in the BDPA.[63]

The provinces had led the way in legislating in the area of consumer credit while the federal government had remained largely inactive. The provinces had built up considerable experience with legislation and administration in the field. The legitimacy of their interest in the subject matter was certainly unquestionable, as was that of the federal government. There were real problems of constitutional overlap or conflict in legislation and administration, yet the federal government, at least initially, failed to be sensitive to the implications of its proposals for provincial interests.[64]

There had been no formal consultative mechanisms until December 1975, when a federal-provincial conference of ministers was held in Ottawa. The provincial responses to federal proposals were generally negative with respect to both the substance and the process.[65] Provincial opposition continued to grow and solidify through subsequent conferences and meetings. The increasing sophistication, power, capabilities and experience of the provinces, combined with federal inadequacies, led the provinces to develop into a strong opposition force.[66] The several concerns of the provinces included the following:

Jurisdictional intrusions The federal government apparently hoped to be able to justify the omnibus bill under the interest head of power. The provinces felt, and probably correctly, that this was an overly simplistic

characterization. Many of the provisions could be viewed as intruding on provincial jurisdiction over property and civil rights. Even if the provinces were to refrain from challenging the BDPA on constitutional grounds, constitutional doubts were raised by many other interests before the House and Senate committees. The prospects for test cases down the road were substantial.

Legislative duplication, inconsistency and conflict In a number of cases the proposed BDPA provisions overlapped with existing provincial legislation. The provinces were concerned about the practical effects of the confusion generated, the difficulty of reconciliation, the potential for conflict in compliance efforts and related jurisdictional uncertainties.

Administration There was also a concern that the federal government had not really thought through the administration and enforcement of the act. This would seem to require some kind of arrangement between the federal government and the provinces, but the federal government had not consulted the provinces on this important topic prior to tabling the BDPA.

Reliance on regulations The federal government intended to rely heavily on regulations to fill in the details of the scheme. Not only did the provinces question such an extensive use of subordinate lawmaking to deal with matters of principle; they also wanted early and intensive consultation on the subject matter of the regulations, as they would extend to areas already covered by provincial legislation.

Uniformity and federal-provincial cooperation Many of the provinces acknowledged the desirability of greater uniformity in the various laws governing consumer credit. However, they did not agree with the federal government, or even between themselves, on how to accomplish this goal. Federal-provincial cooperation in the enactment of the Canada Business Corporations Act and the administration of Part X of the Bankruptcy Act were noted as possible models for a fresh start.

The need for some kind of formal mechanism for discussion and conflict resolution was apparent, and the federal government had not dealt adequately with that need. In December 1976, the provinces met in Edmonton and decided to recommend the establishment of a permanent federal-provincial committee of senior officials. Eventually, on the eve of the BDPA's demise, a federal-provincial task force on consumer credit was created.

The Fall of the BDPA

When the BDPA was introduced, a federal press release stated that the bill had been drafted as a direct result of consultations with consumer representatives, credit institutions and the provinces, and that provincial representations had been considered in order to minimize conflicts.[67] This statement was countered by a press release from the B.C. consumer affairs minister, who responded that "there has been no meaningful consultation with the Provinces concerning this legislation, unless you consider as consultation the Federal Government telling the Provinces what they intend to do."[68]

There was obviously considerable hostility, and the federal government began to reconsider its procedures for discussions with the provinces. As a consequence, its role shifted, by the end of 1976, from one of initiative and attempted leadership to one of response and accommodation. A new series of meetings and consultations began that led to a decision to freeze further parliamentary consideration of the BDPA until more provincial support could be garnered.

One important concession to the provinces was a proposal that the act be proclaimed in two stages. The first stage would involve proclamation of the provisions that essentially updated federal law. The second stage, involving sections that might conceivably intrude on provincial law or jurisdiction, would await further negotiations with the provinces with the aim of achieving a greater degree of consensus prior to enactment.[69] A later suggestion went even further, providing the provinces with the choice of opting in or out of the provisions deemed to be of particular concern. Opting out would be available where there was substantially similar legislation in place in the affected province, or where such legislation was contemplated and likely to be in place by a specified date.[70]

It was becoming apparent, however, that the BDPA was on very shaky political legs. Federal-provincial relations continued to be strained, despite federal attempts to reach a compromise. By early June 1977, sixty motions of amendment had been prepared, and the original omnibus package lay in tatters when Parliament broke for the summer recess on June 21.

Nevertheless, the federal Department persevered in its attempts to rewrite the BDPA into a new consumer credit bill, this time in close consultation with the major interest groups. Relations with the provinces began to improve with the establishment of a Permanent Committee of Deputy Ministers and the Federal-Provincial Task Force on Consumer Credit. One participant reported in October 1977 that the working relationship was quite harmonious, although many problems remained.[71] Some of the provinces were concerned about spending time and resources on further analysis when so many of the issues remained unclear.[72]

This concern was justified. Although a Fair Credit and Savings Act was drafted by December 1977, it was never introduced. In August 1978 the Consumer Research Branch recommended withdrawal of the plan for omnibus legislation.[73]

The BDPA was dead, and the decision was made that credit law reform at the national level would proceed, if at all, on a piecemeal basis. The omnibus approach was dropped and priority was given to those points of concern having a visible federal nexus and Commons support.

The Legislative Aftermath

In December 1980 usury legislation was enacted that repealed the Small Loans Act and added a provision to the Criminal Code establishing a "criminal rate" for interest.[74] The legislation implemented two of the provisions dealt with in the BDPA and, although the need for some type of legislation was generally recognized, there were sharp differences on the appropriateness of the approach taken. It was suggested that the government was responding to pressure from credit unions.[75] However, national standards were now in place, and it had been shown that Parliament could digest credit law changes in small pieces.

Also passed by the end of 1980 was the Banks and Banking Law Revision Act, 1980.[76] The accompanying Cost of Borrowing and Disclosure Regulations were released for comment, and their final version came into effect early in 1983.[77]

The regulations were the product of an extensive federal-provincial-industry consultative process. On the governmental level, the federal-provincial Task Force on Consumer Credit met in 1979 to discuss the subject. The federal Department of Finance recommended a standard that was regarded by many provinces as too lenient compared with their own requirements. Confidential representations by federal Consumer and Corporate Affairs officials to Finance and the Privy Council Office (federal-provincial relations secretariat) supported the provincial consensus and led ultimately to a strengthening of the disclosure provisions.[78] The overall process constituted a marked improvement over the BDPA experience. In turn, the federal requirements and the consultations employed to achieve them have improved the prospects for harmonized provincial standards for trust companies and credit unions operating under provincial law. British Columbia is a case in point; the province's cost of borrowing regulations, now being drafted pursuant to its Consumer Protection Act, are patterned after the Bank Act model.

In recent months the legacy of the BDPA has surfaced again in proposed federal amendments to the Interest Act. The federal measures relate to mortgage lenders and would affect such matters as disclosure requirements, prepayment penalties, and the recognition of variable rate mortgages and index-linked mortgages as well as their regulation. The

amendments were fashioned in part at federal-provincial task force meetings, and the handling of this issue shows a willingness to use the consultative process to coordinate federal and provincial efforts. The amendments have been embodied in Bill C–36, which was given first reading on May 25, 1984.

Concluding Observations

The legislative parameters of consumer credit do not readily separate provincial and federal interests and responsibilities. The constitutional division of powers in this area is quite complex, and provincial experience is of some considerable longevity; yet the interjurisdictional core of the subject tends to favour a federal leadership role.

The failure of the federal proposals in the omnibus BDPA was a stark reminder that federal initiatives to press for national credit law standards (or to encourage greater uniformity between the provinces) must proceed on the basis of careful consultation and a modicum of agreement with the provinces. This was particularly so in the case of the extensive provincial credit legislation that already existed and that contained significant areas of overlap with proposed BDPA measures concerning contract disclosure requirements, business practice laws, the reform of collection practices and the regulation of provincial financial institutions.

On the positive side, the demise of the BDPA did spawn the formation of a fairly active consultative process between the federal and provincial governments, beginning with efforts at piecemeal credit law reform and extending later to additional topics of mutual interest and concern.

Those efforts were to wind down for reasons discussed in the next chapter. However, the flurry of collaborative and consultative activity in the 1977–81 period did lay the groundwork and experience to suggest that salutary lessons were derived from the BDPA debacle. Similarly, it demonstrated the benefits of greater coordination of federal-provincial efforts, which in turn promotes interjurisdictional harmonization of legislation and administration in areas of common interest.

Intergovernmental Relations in Consumer Protection: Process and Practice

In this section we propose to review the conduct of intergovernmental dealings on trade practices, debtor assistance and consumer credit over the past 20 years, concentrating on the federal-provincial dimension. Two points might be mentioned by way of introduction. First, with reference to the three subject areas chosen for this paper, we are not proceeding on the silent premise that legislative or enforcement diversity has seriously impaired the Canadian economic union. We doubt that a case for urgent reconsideration can be made. On the other hand, stronger federal leader-

ship might be valuable in other areas of concern to consumers, such as product safety (and the related implications for personal injury redress), and the regulation of financial institutions (particularly after the Crown Trust episode) and electronic payment systems now being acted upon by the federal government in consultation with affected interest groups.

The second point is that the federal constitutional authority to develop national standards in the area of economic regulation has been strengthened considerably by recent decisions and dicta of the Supreme Court of Canada.[79] This was discussed in our treatment of the Borrowers and Depositors Protection Act (BDPA) and would apply with comparable vigour to any proposed federal trade practices act.

The issue here is not so much the division of powers as the process by which governments share powers in our federal system and their record in doing so. Our analysis of three fields — consumer credit, orderly payment of debts and trade practices — confirms the strength of a federalism in which interprovincial diversity coexists with varying forms of federal legislation in the same general subject areas. Overt legislative conflict is infrequent, but the potential for duplication, overlap and program entanglements continues to exist. To what extent have these hindrances to efficient regulation been mitigated or otherwise affected by the existence of consultative and planning machinery between the federal and provincial governments?

The 1977 BDPA Meetings: Ripples on a Big Pond

As Professor Romero observed in his 1976 study,

> The formal channels of communications [between 1966 and 1976] have been maintained both through the attendance of federal officials at interprovincial meetings of consumer affairs administrators and through ad hoc federal-provincial conferences and meetings called to deal with specific problems.[80]

As the legislative activity of both levels of government escalated in the early 1970s, these meetings did not cope very well with the basic diet of intergovernmental dealings – the exchange of information and statistics, discussion of common administrative concerns, or advance consultation on legislative priorities in areas of concurrent jurisdiction.

As noted earlier, the serious objections raised by the provinces to the federal government's BDPA package prompted a concerted effort by a joint committee of senior officials in 1977 – 78. They considered how the federal proposal might be meshed with provincial resources and existing legislation to produce a joint legislative package that would still satisfy basic national objectives. It is important to put these federal-provincial efforts into perspective. If nothing else, the experience will lead to a better understanding of the legal and political factors that prompt joint interest in regulatory harmonization.

By May 1977, the federal government was still committed to pressing ahead with its BDPA legislation.[81] Undertakings had been given to consult with the provinces regarding regulations and the possibility of delegating the administration of those parts of the package respecting advertising and disclosure provisions for deposit and lending transactions, the regulation of usurious borrowing rates and credit statements, and civil remedies. Unlike the second part of the proposed act, whose proclamation would be delayed pending consultation with the provinces, Part I would be proclaimed as soon as feasible after passage of the legislation. Part I was concerned with criminal collection practices, mortgage prepayment, interest calculations, deposit regulations and revision of the Small Loans Act.

Three possible approaches to implementing Part II were set out by federal officials at the 1977 federal-provincial officials' meeting:[82]

> *1. Model Act* — Where the Provinces have existing or proposed legislation which covers the same terrain as Part II of BDPA, then any federal-provincial discussions will be for the purpose of trying to reach agreement on BDPA regulations and the appropriate standards of provincial legislation so that the two can be considered to be "substantially similar." When this similarity standard has been reached, BDPA will only be proclaimed in the Provinces in respect of banks and possibly other federal institutions.
>
> *2. The AIB Approach* — Adopted in 1975 by the Anti-Inflation Board; under this approach the Provinces would have the ability to agree that the Part II BDPA revisions would apply in the province. This option would be implemented through a federal-provincial agreement which would also contain the details of delegation of administrative responsibility to the appropriate provincial Minister.
>
> *3. Mixed-Model Approach* — In this situation, it would be contemplated that provincial legislation would be substantially similar with most but not all of Part II provisions. Under the mixed-model approach, BDPA would be proclaimed in the province with respect to banks and all institutions in those areas where the provincial legislation is not substantially similar.

The "ultimate goal of the consultations," according to the federal paper, would be "a proclamation date for Part II of BDPA (possibly coordinated with individual proclamation of appropriate provincial legislation) for the entire country."[83]

Many provincial questions and concerns were raised at the meeting, but it was agreed by officials from both levels to propose to ministers at their forthcoming July 1977 meeting "the establishment of an ad hoc Task Force on BDPA which would be responsible for dealing with the implementation of and regulations under the BDPA."[84] That task force was established, but for reasons discussed earlier, its work was cut short by the subsequent collapse of the federal Cabinet's support for an omnibus consumer credit statute.

We have detailed this train of events to show the level of adjustment and design that had been reached by mid-1977 by the effective combination of federal and provincial interests in an area of shared legislative involvement that called out for reform and rationalization. Hindsight suggests that more sensitive federal planning, less ambition and more advance consultation, along the lines of the May 1977 package, just might have resulted in the passage of an effective BDPA involving both levels of government.

Regularizing Contacts and Striving for Program Rationalization

On a more positive note, steps were taken at the May 1977 meeting of senior officials that were to influence and channel the conduct of intergovernmental relations in consumer matters for the next three years. For example, the first steps were taken to establish a permanent committee of deputy ministers on consumer affairs. This group was charged with

> . . . working towards the achievement of greater harmony in provincial legislation and legislative initiatives, and towards optimal compatibility between federal and provincial legislation and programs with a view to rationalizing activities and achieving the highest possible standards of consumer protection and services for all Canadians within prevailing resource constraints.[85]

Suggestions for the establishment of a permanent secretariat were deferred indefinitely, but it was agreed that the committee, with the approval of ministers, would establish "as the need arises, ad hoc task forces of federal and provincial officials to examine specific issues."[86]

The spinoff from these directions was immediate. Under the rubric of program rationalization, the federal Department proposed four areas for discussions to reduce duplication, cut expenditures, and increase the efficiency of administration and enforcement. The four areas were trade practices, consumer complaint systems, consumer research projects, and legislative programs. Our attention will be restricted to the topic of legislative rationalization, given its clear effects on the subject of this paper.

The May 1977 meeting produced an agreement to establish a permanent task force on legislative programs with a mandate to provide advance notice concerning the legislative concerns and priorities of provincial and federal governments; formulate model legislation as directed by ministers or the permanent committee of deputy ministers; and rationalize legislative proposals of mutual interest and concern.[87]

Separate ad hoc groups had been given responsibility for dealing with the proposed BDPA and a so-called "rust code" to deal with motor vehicle corrosion. The legislative task force held regular meetings and, in the next two years, tended to concentrate on warranty/product liability

legislation. Their work was assisted by research commissioned by the federal Consumer Research Branch in consultation with its provincial counterparts. According to interviews, the several task forces and the deputy ministers' committee took on lives of their own and were quite productive over the next several years in terms of meetings, the distribution of research reports and regular discussions between federal and provincial officials with responsibility for similar subject areas.

On balance, it might be said that the 1977–80 period was marked by much discussion, considerable research, minimal legislation and not much else. Federal initiatives with respect to the Borrowers and Depositors Protection Act and the Trade Practices Act withered away and, with the possible exception of Quebec, the brief golden age of provincial lawmaking quietly wound down. Passage was again denied to bankruptcy reforms and, except for a few provinces, proposals for product warranty legislation were shelved and the enforcement of existing consumer protection legislation went on in relative obscurity.

By 1980 it appears that some ministers were coming to the view that the staff committees and task forces were perhaps no longer necessary.[88] The task forces on research (including research into warranties, product liability and performance standards), consumer services and legislative programs were disbanded by the following year. The deputy ministers' committee lost its mandate to set direction and establish priorities; this responsibility reverted to ministers in the context of their annual meetings. The deputies continue to meet once or twice a year, but other senior staff contact is intermittent, and one senses that much of it is restricted to provincial officers and their federal counterparts working in regional offices.

Concluding Observations

At the risk of oversimplification, the consultative experience in intergovernmental relations can be broken into four periods. The first, between 1966 and 1972, might be called the occasional contact period. A few successes were recorded (for example, the passage of complementary legislation to give consumers defences against finance companies holding their promissory notes originally given to retailers of defective or undelivered goods) and initial meetings were held, but little else was accomplished by way of advance notice of legislative intentions and programs or other steps that might lead to greater federal-provincial legislative uniformity or harmonization. By the mid-1970s, the provinces had begun to exhibit a fractious, aggressive diversity. This was countered by reactive federal attempts to develop a national presence in consumer credit regulation, trade practices and debtor protection plans. We were into the "province-building period" of 1973–76.

The institutional result was a near-breakdown of communications and a forecast of overt legal conflict, particularly if the federal government persisted with its BDPA and trade practices proposals. Relations remained much better on the bankruptcy/debt payment side of the ledger.

By 1977 the strains on federalism produced a joint realization that better cooperation and coordination were preferable to the policy balkanization that was going on. These influences led to the emergence between 1977 and 1981 of the "senior staff dialogue period." Task forces and committees abounded, plans were cautiously exchanged, research primarily for provincial consumption was paid for by the federal Department, and the first steps were taken to plan legislative programs together. As political circumstances would have it, however, the areas proposed for study and joint action rarely achieved a high priority, and interest in the collaborative efforts declined in parallel. Still, steps were taken under federal authority to deal with several aspects of the original BDPA package, and while provincial reaction was far from uniformly supportive, the provinces did show some interest or, failing that, remained neutral.

However, the interesting framework created in 1977 for collaborative research, legislative planning and regularized communications was never in existence long enough to test its mettle. By 1981 the system had slipped into the "coma period" in which it continues to rest.

Part of the political reason, interviews suggest, is that by 1980 a number of the ministers had decided that the permanent committee of deputy ministers and its acolyte task forces were becoming too autonomous in the style of the Association of Superintendents of Insurance. Some ministers apparently felt that the association had become an authority unto itself and that individual superintendents were not sufficiently accountable to their ministers.

This is not the place to argue the accuracy of this characterization. It is mentioned only to shed light on a powerful reality of which we must be aware in any discussion of power sharing between two levels of government. There is considerable evidence that the diversity of provincial consumer legislation is strongly rooted in the conviction of many politicians that each province, to the greatest extent possible, must be seen crafting its own responses to its own problems. This is a gross oversimplification of a complex question of public policy making and legislative development. But the indigenous model of Canadian lawmaking is a fact of our federalism, and the demise of the bureaucratic collaborative model in existence between 1977 and 1981 can be explained partly by provincial ministerial suspicions.

This political chemistry reflects an insularity that is not conducive to dialogue or collaborative action. In "good" times, it has undoubtedly fostered experimentation and some compelling examples of creative lawmaking. In these times, the results are cause for concern.

Harmonization and Interjurisdictional Legislative Models

In this section we examine, in terms of institutional and legal frameworks, the range of approaches that have been employed or proposed by the federal and provincial governments to protect Canadian consumers. We consider a total of seven approaches or models. Our analysis leans heavily on the results of the preceding case studies on consumer credit, debtor assistance and trade practices. We propose to gauge their respective contributions to the goal of harmonization. In the final section, several findings and recommendations are offered for consideration.

The Paramount National Standards Model

In this situation the federal Parliament has exclusive or paramount jurisdiction in the subject area. Any resulting legislation by definition sets national standards that cannot be varied or otherwise affected by provincial legislative action. Harmonization in its various shades and meanings really has no application here, because there is only one valid exercise of legislative authority and it is vested in Parliament.

At the same time, the question of administration and enforcement may be treated separately, either by agreement or by force of the Constitution. This was the case with the original misleading advertising provisions in the Criminal Code. Federally enacted, the provisions were enforced by the provinces until they were transferred to the Combines Investigation Act in 1969. In this type of situation, a national standards statute might be administered and enforced according to varying standards linked to provincial resources and inclinations. Where this happens, legislative unity is softened by administrative differences. The potential thus exists for a degree of "disharmony" in the operation of the legislation between provinces.

Under this model, the highest standards of harmonization are achieved in federally administered federal statutes. The next highest level will be found in those instances where the legislation embodies administration and enforcement requirements that are more likely to encourage, if not compel, similar priorities and standard of implementation among the provinces.

Suffice to say that the first model has but a limited contribution to make to the pursuit of harmonization in Canada. It rests on a clear division of powers and, in practical terms, on the absence of provincial initiatives that might otherwise have to be challenged or pushed aside for the federal standards to assert themselves. We must remember that our courts are inclined to favour a concurrent powers approach when faced with a division of powers argument where both Parliament and the provincial legislatures have acted in a subject field. That is not our situation here.

The Mirror Legislation Model

The closest example of this type of approach to harmonization is the Australian National Companies and Securities Industry Scheme discussed in the Appendix. The scheme involves comprehensive national legislation, mirror legislation in the states, and joint machinery for putting the regulatory system into operation. As noted, the results have not produced a truly uniform legislative framework but they have maximized the similarities of approach toward regulating a common subject field in a federal system.

A recent Canadian example of the mirror model is the Canada–Nova Scotia agreement on the joint management of offshore oil and gas resources. Under an agreement reached in March 1982, the two governments "agreed to put aside their respective claims to jurisdiction over the offshore and to develop a common, unified system for revenues and management."[89] On May 31, 1984, each government tabled legislation to establish formally the major elements of the 1982 agreement.[90] The essence of the joint approach is to establish identical, complementary provisions for the offshore area. The federal measure will apply to the "Canada lands" and the provincial enactments, containing the same provisions, will apply to the "Nova Scotia lands" within the offshore boundaries. According to a joint statement issued on the tabling of the bills, the two governments will

> . . . avoid the need to resolve the jurisdictional question through delegations to the Canada–Nova Scotia Board and complementary delegations to respective Ministers. Both Ministers will make extensive delegations for the entire offshore area to the Board. Retained powers — those not given to the Board, including the right of each Minister to substitute his or her decisions for a decision of the Board — are delegated on a geographically complementary basis between the two Ministers so that at any one point in the offshore, there is only one Minister for both sets of legislation.[91]

These approaches — the Australian scheme and the Canada–Nova Scotia agreement — are products of political craftmanship. They occur, not very frequently, when the subject is of importance to both parties and where there is some uncertainty about the division of powers; a pooling approach thus becomes attractive for its positive sum advantages.

Some elements of the legislative options proposed by the federal government in the late stages of its BDPA initiative came close to the mirror model. That episode serves as a reminder, however, of the difficulties involved in selling the model in a multilateral forum. Interests, priorities and inclinations tend to vary widely in a federal system, and it takes special circumstances for the political and legal factors to combine to make legislative pooling a decision that both parties are willing to

make. Once achieved, however, the approach strongly supports administration, enforcement and future amendments on the side of harmonization.

There is little doubt that the mirror model is the apex of collaborative federalism. However, perfection is not easily attained. The history of diversity and concurrency is strong in Canada, and the attractions of substantial revenue sharing underpinning the Canada–Nova Scotia agreement are nowhere to be found in the consumer protection field. The symmetry and comprehensiveness of the mirror model are enticing, but there is little in the Canadian experience to suggest that the approach is likely to figure in the harmonization of consumer-oriented legislation.

The Jurisdictional Abstention Model

This approach depends on the legislative inaction of one level of government that has the constitutional authority to act in the subject area but refrains from so doing. The vacuum thus created is occupied by the other level of government. The result is that there is only one set of laws, and harmony between jurisdictions is achieved, as it were, by default.

This bilateral relationship may be extended, by design or inadvertence, to two or more provinces where the legislating government is the federal one. In the trade practices area, this is now the situation in New Brunswick, Nova Scotia, Manitoba and Saskatchewan. In those jurisdictions, the only pervasive marketing practices legislation is the federal Combines Investigation Act. The legislation in the circumstances is the same because of its federal origins and is enforced by the marketing practices branch of the federal Department of Consumer and Corporate Affairs. Subject to judicial interpretations that may vary among the several provincial courts, the legislation stands alone and national standards are in place.

The contribution of this approach to the quest for harmonization depends on the settled constitutional validity of the federal legislation and the continued abstention from legislative initiatives by the provincial governments. Obviously this approach is on the periphery of our concerns, because harmonization in the federal-provincial sphere is, by its nature, the maximization of similarities in coverage and approaches by lawmaking governments. But the model does remind us that abstention or withdrawal from lawmaking by one or more of the provinces gives full force to federal standards. Whether those standards are sufficiently strong or adaptable (due, for example, to constitutional limitations) is a separate matter.

The Contract Model

As Professor Romero observed in his 1976 report, *Federal-Provincial Relations in the Field of Consumer Protection*,

> With regard to areas of overlapping jurisdiction, great benefits could be derived if an agreement could be reached on the division of the area before the legislation is passed. This type of arrangement has been worked out in other subjects such as agriculture, where by section 95 of the [Constitution Act] the federal and provincial governments share concurrent powers. . . . Agreements on division of common areas would be facilitated if a consensus could be developed on the type of activity which each level of government can do best.[92]

The contract model carves up the jurisdictional pie along program responsibility lines. The result is more a rationalization of responsibilities than harmonization of legal design. But we also must acknowledge that the approach enhances certainty in the marketplace, avoids duplication, streamlines administration and reduces government costs. To the extent that harmonization is synonymous with the values of certainty and the similarity of legal approach, the contract model is a strong ally of harmonization.

The several attempts to allocate responsibility for regulating national and local advertising along federal-provincial lines is an example of the contract approach. The failure of those efforts (although there is some acceptance of the split among field level staff) suggests that the likelihood of agreement is probably greater at the formative stages of lawmaking by the affected governments. At that early stage, positions are perhaps more flexible and accommodation may be attainable. The system also probably requires mechanisms for regular communication, the exchange of legislative plans, and a good amount of mutual trust at senior staff levels. These factors would enhance the likelihood of early discussions to explore the potential for mutual advantage if responsibilities in an area of crossover authority were split along federal-provincial lines.

The Conditional Legislation Model

Coordination and harmonization can be materially advanced under this approach. There are two forms of the model and each deserves comment.

The first might be called the opting-in form of the conditional legislation model. Under this approach, the federal Parliament possesses the clear constitutional authority to make laws in the area. We can use Part X of the Bankruptcy Act as our example. The legislation operates only in those provinces that request its proclamation within their boundaries. Under agreements with federal authorities, the provinces administer the legislation subject to reporting requirements and other forms of administrative accountability set by the Superintendent of Bankruptcy as a

condition for transferring legislative authority to the province. The actual arrangements are bilateral, but the cumulative effect of the separate delegations will usually establish a uniform legislative regime across the provinces, along with a high degree of administrative harmonization.

The other variation of the conditional model might be called the negative option approach. In this case, the federal statute contains a provision stating that it will come into force only upon proclamation. That event in turn depends upon provincial legislation in the subject area. In this situation,

> the legislation or parts of it [would] . . . be proclaimed only in those provinces where it is deemed necessary. This type of approach could be used by the federal government to ensure minimum standards of consumer protection across the country. The federal statute could go into force in those provinces without equivalent legislation but it would not be proclaimed in the provinces which are active in the area.[93]

An analogous suggestion was proposed by federal officials in the closing days of their attempt to rescue the BDPA. Under one proposal, federal authorities would have withheld proclamation of parts of the BDPA where, in respect of provincial financial institutions, provincial legislation was considered to be "substantially similar" to the BDPA standards that would apply to banks and other federal institutions.

Another example of the approach can be found in the treatment of pyramid and referral sales in the federal Combines Investigation Act. With respect to the former, for example, the act provides that: "This section does not apply in respect of a scheme of pyramid selling that is licensed or otherwise permitted by or pursuant to an Act of the legislature of a province."[94]

The conditional legislation model rests on federal initiative, clear constitutional authority and good lines of communication between the two levels of government. The first approach yields legislative uniformity and a high degree of administrative coordination. The second approach produces "substantially similar" legislation and recognizes minimum national standards but probably yields a lower level of administrative/enforcement harmonization.

The Concurrent Legislation Model

This is truly a "Made in Canada" approach. The model figured prominently in the earlier discussion of the regulation of trade practices. Under this approach, it is quite possible that each jurisdiction will act entirely on its own in a common subject area and exercise to the margin its constitutional capacity to produce legislation. This is not to deny that a high degree of similarity may be found between the statutes, particularly as between provinces.

The BDPA and TPA experiences illustrate that the concurrency model results when a majority of the provinces have moved into a field of economic regulation/consumer protection before federal legislation is in place. A provincial legislature can, if the government wishes, move much more quickly than the federal Parliament, and the commitment to provincial action to meet local priorities is a factor not to be taken lightly in Canadian federalism.

As a result, where the provinces have acted first in a field whose constitutional parameters extend to both levels of government, the concurrent legislative model has tended to predominate. It might be said to be a condition of a successful start of the collaborative/complementary model described in the next section. On the other hand, vigorous provincial programs in the period between 1973 and 1980 would suggest that the concurrency model was far from a second-best solution.

Harmonization in these circumstances tends to surface at the administrative/enforcement level in pragmatic arrangements (usually without written guidelines) to allocate cases for enforcement or to make other arrangements favouring administrative disentanglement. However, it is difficult to be precise about the extent or effectiveness of these measures and they are of little consequence to those Canadians who favour a formally coordinated, single-layer approach to consumer protection.

The Collaborative/Complementary Model

The possibilities for this approach to federal-provincial relations in consumer protection matters were probed in the 1977–80 period discussed earlier. The formation of a permanent committee of deputy ministers, with authority to create subject-area task forces, provided the beginnings of a multilateral forum. Without such a body, whereby senior members have some authority and meet regularly, this model has little chance of implementation or longevity.

The model works on the premise that many areas calling for consumer law reform require a coordinated approach by interested governments whose separate powers and resources are unequal to the needs of reform. It will be seen that the model could have aspects of the pooling approach, perhaps the conditional legislation approach or elements of the abstention model. In terms of the total picture, the models discussed are not mutually exclusive.

Perhaps the collaborative/complementary model can be best discussed by using an illustration drawn from research commissioned during the dialogue period of 1977–80. In the following pages, the options open to the two levels of government in terms of their altering the law and practices governing product liability are set out in tabular form.[95] The presentation is based on a series of research studies requested by the

deputy ministers' committee in support of their mandate to coordinate legislative proposals, encourage harmonization of legislation, and to act on items of common interest.

A brief perusal of the accompanying table will confirm the linkages between complementary legislative and administrative actions involving the federal and provincial governments. The reform options rested upon a considerable amount of interdependence between joint data-gathering programs, federal product safety legislation, provincial warranty statutes, improved dispute settlement systems, and coordinated research programs.

Concluding Observations

There is little doubt that the collaborative/complementary model is the high watermark of cooperative federalism. Depending on the problem to be addressed, the solution under this model might include mirror legislation, administrative/enforcement pooling arrangements, interconnected or common data bases, and coordinated legislative timetables. Less comprehensive versions of the model might involve more distinct separations of the lawmaking, enforcement and administrative functions, but their pace, coverage and implementation would be coordinated by provincial and federal governments. Each of the subjects treated in this paper — trade practices, consumer credit and debtor assistance — stands as an attractive candidate for renewed collaboration along the spectrum of harmonization contact points made available by the model.

For the foreseeable future, there is little reason for optimism about change in any of the three areas. The potential for a wider and more effective delegation of powers relating to consumer debtors under a new Bankruptcy Act is to be acknowledged, but ten years of parliamentary inaction are not to be discounted. Nonetheless, the conditional legislation model adopted with respect to Part X of the present act augurs well for the extension of a common legislative plan for the overcommitted debtor in Canada.

With respect to trade practices and consumer credit, the harmonization potential offered by the mirror, abstention and conditional models might have been within our grasp in the 1977–78 period. But the proposals by the federal government in the face of substantial pre-existing provincial legislation were wrongly timed, and the more independent-minded provinces felt little legal or political pressure to join the fold. The demise of the BDPA forecast a similar fate for the later federal Trade Practices Act proposal.

Some purpose will have been served by this analysis if, as a result of past experience, we have a better appreciation of the interjurisdictional mix that must exist if the two levels of government are to adopt similar legal approaches to an area of common concern in which they exercise

Products Liability Reform Options In Summary Form

A. Personal Injury

No.	Option Title	Option Summary	Linkage to Other Options
1	Research/data-gathering program	(a) Cooperative federal-provincial establishment of national electronic injury surveillance system (NEISS);	Also included in Options 3 and 4
		(b) Coordinated federal-provincial research into (i) Existing state-run first-party no-fault benefits programs; and (ii) Existing tort-litigation third-party liability insurance schemes.	• May be joined with Option 1; • Included in Option 3; • Included in Option 4 as "secondary research" following acceptance in principle of universal accident compensation scheme
2	Strict liability rule applied by courts in individual lawsuits	Proceed upon the basis of the Draft Products Liability Act proposed by Ontario Law Reform Commission (1979).	• May be joined with Option 1 • Forms initial part of Option 3 • If adopted, without prejudice to future consideration of Option 4

A. Personal Injury (cont'd)

No.	Option Title	Option Summary	Linkage to Other Options
3	Strict liability rule plus strengthened safety regulation	(a) Provincial adoption of Option 2;	Repeats Option 2
		(b) Joint federal-provincial establishment of NEISS and research commitments per Option 1;	Repeats Option 1
		(c) Systematic transmittal of provincial product defects and injury data obtained in complaints-handling activities to federal product safety authorities;	Possible under any option
		(d) Strengthened regulatory powers for federal product safety legislation, especially in area of product recall and removal from public distribution;	Research focus in Option 4 but quite compatible for immediate inclusion
		(e) Addition of legal capacity for citizen-initiated inquiries under federal product safety legislation;	Precedent in Combines Investigation Act
		(f) Reappraisal of the adequacy of research and administrative resources available to product safety authorities particularly federal.	Repeated in Option 4

A. Personal Injury (cont'd)

No.	Option Title	Option Summary	Linkage to Other Options
4	Adoption in principle of universal accident compensation as starting point for reform	(a) Joint federal-provincial establishment of NEISS;	Incorporates Option 1(a)
		(b) Rejection of Option 2;	Rejects "tort-tinkering" approach of strict liability rule
		(c) Priority to integrated and comprehensive first-party, no-fault accident compensation scheme as reform starting point;	Focus on products liability in compensation and deterrence terms
		(d) Coordinated intergovernmental secondary research program leading to basic decisions on institutional, legal and administrative design questions;	Option 1(a) research base but directed toward the optimal design of accident compensation program
		(e) Work toward eventual enactment of a universal disability insurance scheme	Longer run goal

B. Warranties — Financial Loss

No.	Option Title	Option Summary	Linkage to Other Options
1	Enactment of omnibus consumer product warranty (CPW) legislation	Provincial adoption of modern CPW Act using precedents in Saskatchewan, Quebec and New Brunswick to clear away long-identified legal anomalies and deficiencies.	Foundation for Options 2 — 4 inclusive
2	CPW Act plus strengthened enforcement and remedial measures	(a) Option 1 as legal base;	Repeats Option 1
		(b) Add administrative enforcement and remedial powers: (i) Cease and desist order; (ii) Assurance of voluntary compliance; (iii) Substitute Action; and (iv) Prosecution;	Preferred component in Option 3
		(c) Add consumer-initiated enforcement and remedial powers: (i) Citizen-inquiry procedure; (ii) Consumer class actions, or in the alternative; (iii) Minimum recovery provision for successful civil action; and (iv) Right of standing to seek injunctive or declaratory relief from the courts.	Preferred component in Option 3

B. Warranties — Financial Loss (cont'd)

No.	Option Title	Option Summary	Linkage to Other Options
3	CPW Act plus establishment of dispute settlement and information programs	(a) Enact new CPW Act per Option 1;	Repeats Option 1
		(b) Support improved consumer education and information programs;	
		(c) Monitor and publicize post-contractual information requirements concerning warranty rights and claims procedures per new CPW Act;	Greater public awareness of rights and duties under Options 1's CPW Act
		(d) Foster the voluntary development of plain language, product-specific, standard consumer product warranty forms;	Aims for greater readability in express warranty forms governed by CPW Act
		(e) Encourage experimentation with informal, extra-judicial systems to resolve warranty disputes on a product-specific basis.	Encourages alternative to formal court proceedings invited under Option 1

B. Warranties — Financial Loss (cont'd)

No.	Option Title	Option Summary	Linkage to Other Options
4	Further research and related initiatives	(a) Government-mandated standard warranty forms if voluntary initiatives per Option 3 prove inadequate;	Last resort measure if Option 3's voluntary initiatives fail
		(b) Consider proposals for the "unbundling" of consumer product warranties;	
		(c) Continue research into structure and operation of modern CPW systems;	Research, educational, etc. efforts are the logical, forward-planning phase to the sequence of CPW steps recommended in Options 1 – 3 inclusive
		(d) Greater long-term commitment to consumer education and plain language legislation and contracts;	
		(e) Work toward interprovincial uniformity in CPW legislation.	Self-evident in adoption of Option 1's CPW legislation.

concurrent powers. Our analysis to this point suggests the following conclusions:

1. While some degree of similarity in consumer protection statutes has been achieved at the interprovincial level, the record of accomplishment between the federal and provincial governments in consumer protection matters has been very uneven.
2. In those areas where federal authority to enact legislation is unqualified, the precedent of conditional legislation made available to participating provinces is to be favoured if circumstances are such that provincial administration can be tied effectively to related programs of benefit to consumers.

3. The "negative option" version of the conditional legislation model ought to be favourably considered as a device for offering minimum federal standards as model legislation for provincial adoption or, if a province so wishes, for proclamation by the federal government in the province if the latter chooses not to act.
4. Experience suggests strongly that the potential for disharmony raised by concurrent federal and provincial legislation may be reduced by open lines of communication between the two levels of government. This can also facilitate the adoption of administrative arrangements for problem sharing and disentanglement of responsibilities. This is a second-best solution but one that is part of the Canadian fabric, given the prevalence of concurrent authority in our federal system.
5. The two levels of government ought to be encouraged to re-establish on a formal basis the intergovernmental mechanisms for research and legislative planning that existed in the 1977 – 81 period. Those arrangements were relatively inexpensive to maintain, so that the longer run benefits for the efficient and coordinated development and administration of consumer protection measures would be more likely to be realized.
6. Finally, although there may not be strong evidence that the present mixed picture constitutes a significant barrier to the efficiency and viability of the economic union, the means and the experience exist to improve the federal-provincial relationship in consumer protection matters. Steps in this direction deserve encouragement and support.

Appendix
Some Australian Comparisons

Since Australia's is the federal system most similar to Canada's, it may be useful to look briefly at the Australian experience with harmonization of consumer legislation.

State and Commonwealth Division of Powers

The Commonwealth and the states of Australia have separate constitutions, which must be read in conjunction. There are some areas of exclusive Commonwealth jurisdiction, some areas of concurrent jurisdiction, residual power in the states, and a provision that renders inoperative state laws that are inconsistent with Commonwealth laws.

Commonwealth heads of power include trade and commerce with other countries or between states; taxation, banking and insurance save where either extends beyond one state; bills of exchange and promissory notes; bankruptcy; foreign corporations; trading or financial corporations formed within the limits of the Commonwealth; and borrowing money on the public credit of the Commonwealth.[96] The Commonwealth parliament is also given power to make laws for the governing of Commonwealth territories.[97] There is also a provision that state parliaments may refer matters to the Commonwealth parliament and that the legislation it enacts applies to the referring state and to any other state that may later adopt it.[98] Most of the powers listed above are concurrent; the Commonwealth government one is exclusive.[99]

The states can legislate in regard to trade and commerce, corporations and securities, and consumer protection, so long as the guarantee of free interstate trade and commerce in the Commonwealth constitution is not infringed, and provided the subject matter has a connection with the legislating state.[100] The situation is therefore quite similar to that in Canada, with the exception of the state reference provision.

Interest in and Mechanisms for Uniformity of Law

As in Canada, there has been a general recognition that harmonization or uniformity of legislation is desirable in a number of areas in a federal state. In 1983, the attorney general of Australia identified several areas where diversity is least defensible (business regulation, industrial relations and family law), mentioned that many other areas were "suitable for uniform treatment within a general framework of diversity of laws inevitable in a federation," and pointed out that in other areas new problems, often resulting from new technology, "present the need for fresh and preferably national legislation (e.g., biotechnology)."[101]

In Australia there was no strong pressure toward uniformity until fairly recently; this may be in part due to the fact that state laws and traditions were quite similar.[102] In the 1930s the issue of uniformity was considered, but consideration was suspended during World War II and did not really emerge again until the 1950s. At that time the premier of New South Wales, after approaching the Commonwealth government without success, spearheaded a move among the states that produced substantially uniform hire-purchase legislation. This served as an example for those who had seen a need for uniformity in company law. Companies trading between states were suffering considerable inconvenience through the incompatibility of the various laws. Their pressure led to government action, and a model act was produced and enacted by all states and territories by 1964. It achieved a higher degree of uniformity than the hire-purchase legislation, although the amendment process later reduced the degree of uniformity. During the meetings of ministers leading up to the uniform company law, the desirability of uniformity in other areas was raised, and a standing committee of Commonwealth and state attorneys general was appointed to consider the question.

Since that time the committee has met several times each year, reviewing the whole area of law and working on uniform legislation, complementary legislation, matters of common interest, and other relevant matters of mutual interest. The meetings are informal and closed to the public; action is taken on the basis of consensus. Draft uniform legislation is not made publicly available prior to introduction in one of the parliaments. The work tends to go slowly, involving delays while parties work toward agreement, delays in drafting, and delays in having the legislation accepted by the various legislatures. The model acts tend to be presented to the legislatures as finished products, and any suggestions regarding amendment are not well received.

There is some suggestion that the committee may be used by governments to delay enactment of politically controversial legislation, on the pretext of a commitment to federalism and a desire for uniformity.[103] This will be discussed later in the context of consumer credit. One of the main problems that reduces the committee's effectiveness is a lack of staff and resources. It has sometimes been able to use experts to prepare reports (again, one example is in the area of consumer credit), but lack of funds has forced increased reliance on departmental staff who have other duties and local priorities.

The committee's mandate originally centred on uniformity, but was soon expanded to include other matters of common interest. Its first few years saw the production of a number of uniform laws in the fields of companies, securities, and itinerant sales, but then its legislative production decreased considerably. The Commonwealth attorney general suggested in 1971 that the success of the body should not be judged by the

number of uniform laws formulated, but "rather by the extent to which cooperative effort has assisted in bringing harmony to the laws and administrative action in Australia."[104] In his view, the most important goal of the committee was cooperative federalism. It is difficult to assess the impact of the committee in this regard. Certainly it does provide a forum for the discussion of common interests and the coordination of legislative and administrative interests.

Impatience with the efforts of the committee was probably part of the motivation behind a 1975 approach by the Conference of Law Reform Agencies to participate more actively in the area of uniform law reform. This proposal was rejected, with the committee asserting that it wished to be in complete control of developments in the area of uniformity.[105] Australian developments in the general area of uniformity have been relatively lacklustre,[106] subject to some potential areas for agreement in the regulation of deceptive trade practices, to which we turn in the next section. There are numerous participants, including the standing committee, various law reform agencies, and the governments, but there has been very little coordination. As a result, the attorney general examined the various alternatives in 1983 and proposed the establishment of a National Advisory Council.[107]

The governments have set up some formal and informal mechanisms to enhance information sharing and possibly coordination. Committees of ministers dealing with certain subject areas have been established, but these are not always effective. There is some borrowing of ideas where one state has tried a novel approach that proves successful, but this seems to depend primarily on chance.[108] In general it seems that there is much duplication of effort, rather than sharing of information; again, a coordinating body seems to be needed.[109]

The Consumer Protection Area — Trade Practices

Between 1964 and 1974 all the states and territories enacted various consumer protection statutes; in some areas there is some degree of similarity, though there are significant differences in general scope and details.[110]

There was little federal legislation until 1974, when the Trade Practices Act became law. Part V prohibits certain unfair practices and implies certain fair terms in consumer transactions. The 1974 act was brought in by the Labour government; it was a response to the fact that many of the proscribed practices were interstate in character, that enforcement of state legislation was difficult where companies traded across borders, and that enforcement provisions and activities in the states were not always sufficiently vigorous.[111]

Arguments have been raised that consumer protection matters should properly be left to the states, except where interstate trade is involved,

but the general view is that the act should be retained.[112] A committee appointed by the government in 1976 received many submissions to this effect, and the government accepted its findings.[113]

The constitutionality of the Trade Practices Act does not appear to have been tested. The validity of the act is supported by either the Commonwealth power over "foreign corporations, or trading or financial corporations formed within the limits of the Commonwealth" or the power over "trade and commerce with other countries, and among the States."[114]

The Trade Practices Act broke some new ground, but it also covered some areas already dealt with in state legislation. The potential conflict, the overlaps and the gaps, and the need for cooperation were recognized. Section 75 provided that the concurrent operation of state laws is not excluded or limited and that, where an act is an offence under both state and Commonwealth law, the person may only be convicted of one of the offences. Although the Constitution provides that Commonwealth law prevails in a case where otherwise valid state laws are in direct conflict, it appears that there have been relatively few such situations in the consumer protection area; in general, state and Commonwealth provisions tend to co-exist.[115]

It was also felt important to provide for coordination of legislation and administration on an ongoing basis. The 1976 committee recommended that the governments consider establishing a standing committee of consumer protection ministers, "having as its principal task the achievement of uniform consumer protection laws."[116] Also, Commonwealth and state ministers met and agreed on some guiding principles for concurrent administration. As a result, the Trade Practices Commission formulated a policy for determining the type of matters it would pursue.

The policy aimed at avoiding duplication and supporting cooperation by restricting Trade Practices Commission investigations to matters clearly of multi-state, national or international character, matters involving patterns of conduct affecting consumers generally (as selected in cooperation with state officials), and serious contraventions warranting exemplary action.[117] The Trade Practices Commission treated the states as the principal complaint-handlers dealing with problems of individual consumers, apparently contemplating that the states would refer to the Commission problems that were more national in scope.[118]

The more frequent practice, however, has been for the Commission to refer matters to the states.[119] The 1976 committee had recommended that state authorities be given enforcement responsibilities and powers under the Trade Practices Act, and although the Commonwealth agreed in principle, such amendments to the act have not yet been made.[120] The federal minister did direct the Commission in 1981 to restrict itself to handling matters of importance at the national level that have been brought to its attention by another person.[121]

The actual success of this attempt at Commonwealth-state legislative and administrative cooperation is hard to assess from the sources available in Canada. It was reported in 1978 that gaps in application due to constitutional limitations still needed to be filled by complementary state legislation.[122] There has also been some suggestion that the standing committee of consumer affairs ministers has been somewhat ineffectual in achieving uniformity, in part due to a rather hard-line and narrow-minded approach taken by one or two of the states. It seems that it is difficult to obtain any agreement on substantive issues.

The Commonwealth government has, however, affirmed its commitment to achieving consumer protection legislation.[123] In a 1984 press release it stated that the standing committee of consumer affairs ministers was "actively pursuing this issue" and had set up a special working party of officers to deal with it.[124]

In the same press release the government announced proposed amendments to the Trade Practices Act to update and expand the statute. The Commonwealth also reported that it had been requested by state ministers "to consider a number of additional changes to the present Trade Practices Act which they consider would facilitate the achievement of uniformity by making the Act a suitable basis for mirror legislation elsewhere in the Commonwealth."[125] These proposals were also included with the press release, with the comment that the Commonwealth government had not yet given them full consideration and was not necessarily committed to their implementation. Comments on both sets of proposals were solicited from all interested parties.

In general, however, it appears that the Commonwealth and the state governments agree that uniformity of consumer protection legislation based on an improved model Commonwealth statute is a useful starting point. This common purpose should make for a constructive and cooperative attitude, in terms of both legislative goals and administrative arrangements.

Consumer Credit

One subject not covered under the Trade Practices Act is consumer credit. The development of the law in that area illustrates the relatively slow pace that characterizes some Australian efforts toward uniformity.[126]

Uniform consumer credit legislation has been under consideration since 1965 when the standing committee of attorneys general commissioned a report from members of the faculty of the law school at the University of Adelaide. The resulting "Rogerson Report" met with considerable opposition, particularly from the finance industry. A subsequent report by the Law Council of Australia in 1972 gave general

support to the Rogerson recommendations. For several years the issue was the subject of considerable discussion among the finance industry, consumers, the states, the committee of attorneys general and other interested parties.

Finally, in 1978, the first uniform legislation was introduced into the state legislature of Victoria. It was the subject of finance industry attack and lapsed when the state parliament was prorogued. It had taken nearly 14 years for the standing committee of attorneys general and the other participants to reach this stage. To some observers, even the political sensitivity of the issues was an inadequate excuse for this incredibly slow pace.[127] The need for reform has been widely acknowledged,[128] but at least one writer has suggested that the committee may have used the uniformity model to delay enactment of politically controversial legislation.[129]

During this lengthy process, South Australia decided to introduce its own legislation, based on the 1965 Rogerson recommendations, and this became law in 1972. This involved a decision to sacrifice uniformity (through the repeal of the uniform hire-purchase legislation) in the interests of meeting new social demands.[130] This action apparently had a significant benefit in that the finance industry, after having observed the legislation in operation for five years, became less hostile to the new legislative scheme.[131]

In 1981 New South Wales and Victoria followed the example of South Australia and brought in legislation reforming consumer credit law. It has been speculated that South Australia will now update its 1972 law, and that "the realities of business will now force all parts of the Commonwealth to enact legislation not dissimilar to that now enacted in the two States where most financial activity is concentrated."[132]

The consumer credit example is thus somewhat different from the general consumer protection example previously discussed. In this situation there was some sporadic and inconsistent state legislation, and a perceived need for uniformity. Although there is a strong case to be made for the Commonwealth to pass such legislation, and in fact this was contemplated by the Whitlam government, the political strength of state interests has been a stronger factor.[133] Instead, the standing committee worked for many years trying to develop some form of uniform law that would be accepted by all the states. In the end it was not the efforts of the committee that produced results, but the initiative of several states whose governments felt the pressure for reform and moved to change the legislation. It is probable that their framework will now form the basis for similar, if not perhaps uniform, legislation in the other states.

The National Companies and Securities Industry Scheme

A more illuminating example of an attempt to achieve uniformity or a high degree of harmonization in a federal state is the new National Companies and Securities Industry legislation and administrative scheme in Australia.

In the late 1950s the perceived need to harmonize state and territory company law led to the formulation of uniform legislation, which was enacted by the states and by the Commonwealth (for the territories) in 1961–62. However, the product and its administration were soon deemed to be flawed and ineffectual.

In the late 1960s a mining boom led to unprecedented growth in the securities industry as well as to the formation of a large number of new companies. Concern over questionable practices led to the appointment of a committee to inquire into the establishment of a Securities and Exchange Commission. The Commonwealth government was in close touch with this committee and supported its proposal for a national regulatory commission.

The states were also interested in uniform legislation in the securities industry field and had made some rather half-hearted attempts in this direction. Perhaps because of the Commonwealth government's apparent desire to impose its own scheme on the states, a few of the states signed an agreement respecting uniformity in legislation and administration. By 1975 four states had enacted substantially uniform legislation. There was some thought of inviting other states and the Commonwealth to join the plan, but this was postponed in 1976 when the Commonwealth government announced proposals for a cooperative Commonwealth-state scheme. The proposal was for comprehensive Commonwealth legislation, state mirror legislation, and machinery to put the regulatory system into effect. After negotiations produced revisions, a modified scheme was agreed upon. The formal agreement was executed in December 1978.

The legislative framework takes account of constitutional and political realities. It is possible that the Commonwealth has jurisdiction to impose a national scheme on the states, but this would be open to challenge and would not be popular with the states. Nor would the states likely be willing to refer the matter (as provided for in the constitution) to the Commonwealth parliament, as this would involve a loss of autonomy. Instead the parties accepted that the effective working of the system depends on the cooperative efforts of all governments, culminating in a system of joint legislation.

Given the manner of implementation and administration, the scheme is not truly uniform. The only way of achieving uniformity would have been a single Commonwealth enactment. The method chosen represents a compromise, made possible perhaps by the "balance of uncertainty" 134 regarding constitutional powers.

Uniformity is a fragile device for maximizing the similarity of legal approaches toward regulation in a federal system. Court decisions on the scope of constitutional powers may affect the balance of powers and affect the scheme adversely. Jurisprudence regarding the scheme itself may differ in each jurisdiction. Withdrawal from the scheme is also a possibility.

On the other hand, several innovative steps have been taken to improve the scheme's stability and adaptability. Each state agreed to enact legislation applying the Commonwealth law and repealing other legislation in the subject areas. Amendments are not to be introduced unilaterally to the host statute (and a state may withdraw immediately if the Commonwealth attempts to do so). Amendments to the Commonwealth legislation, however, will apply automatically to state legislation (pursuant to an adoption provision in the original state statutes). While withdrawal from the scheme is possible, it may be done only upon a minimum of one year's notice, thus allowing some time for discussion and negotiation.

The participants in the scheme's administrative system include a ministerial council of Commonwealth and state ministers, which reviews the legislation and supervises the scheme's operation; a National Companies and Securities Commission (NCSC) appointed by the ministerial council and responsible for the entire area of policy and administration (financed one-half by the Commonwealth and the balance shared by the states); and the state and territory administrations that already existed and are now under the supervision of the NCSC.

The initiating intergovernmental agreement thus provided that the Commonwealth would enact the host legislation approved by the ministerial council to create the administering statutory authority (the NCSC) and that each state would enact complementary legislation as required, also approved by the council. The resulting bill was described in the Commonwealth parliament by its sponsoring minister as "an historic piece of legislation . . . [as] tangible evidence of the success of the Government's policy of cooperative Federalism . . . [and as] a model for joint Commonwealth and State action in areas where there is a requirement for uniformity of laws and administration in the national interest."[135]

The ministerial council plays an important role in overall supervision, settles disputes, and strives for efficient and uniform administration. Its support staff includes the companies and securities law review committee, which is undertaking a continuing review of the law and may emerge as a significant source of strength for uniformity and harmonization.

The NCSC has more direct influence on the day-to-day administration and operation of the scheme. As well as giving direction and supervision to state and territory administrations, the NCSC issues policy statements,

manuals of practice and procedure, and legal opinions, all of which should promote uniformity of administration. It is independent from the political process and probably has the widest range of quasi-legislative, administrative and adjudicative powers of any regulatory body in Australia. The NCSC is supposed to encourage development of a decentralized capacity in the state and territory administrations to interpret and promulgate uniform policy and administration.

As with the consumer protection and consumer credit examples mentioned earlier, it is apparent that the success of the scheme will depend to a large extent on Commonwealth/state cooperation. In all these examples it would seem that the most effective way of achieving uniformity is through Commonwealth legislation followed by mirror state legislation and administrative links. The actual working relationships between governments are difficult to assess from a distance, but it is obvious that an attitude of cooperation, trust and accommodation is essential if their respective hopes are to be realized.

Some Observations on the Australian Experience — Lessons for Canada?

Australia is a federal state with a division of powers similar to that in Canada. While lip-service is frequently paid to the goal of legislative uniformity, the mechanisms for promoting the goal have often been rudimentary and ineffective. There appears to be no body with the mandate, resources, commitment and authority to play a strong leadership role. In particular, impatience with the activities of the official body, the standing committee of attorneys general, has led to a new role for the standing committee of consumer affairs, ministers, Commonwealth-state negotiations or state-initiated law reform.

The Commonwealth parliament arguably has constitutional jurisdiction to enact laws of national application in much of the consumer protection field, but political and commercial realities require that accommodation be reached with state governments. In areas of Commonwealth jurisdiction, one frequently finds concurrent state jurisdiction, so compromise and cooperation may be the only way of providing for a high degree of uniformity in legislation and administration. This is especially true where, as in Canada, state legislation has been in effect for some time.

Our three examples confirm that the Australian methods vary considerably. In the national companies and securities scheme, a unique system was developed that involved considerable Commonwealth-state sharing and cooperation, joint administration and a respect for the legislative independence of each participant. In the general consumer protection area, the system used was a federal enactment existing concurrently with state legislation, with administration and enforcement vesting primarily

in states except when cases of national scope or significance were involved. In the case of consumer credit regulation, the institutional mechanisms for achieving uniformity were slow to respond, and the states were left to initiate their own reforms, with the expectation being that other states would follow suit in a consistent manner.

The three examples may reflect the political realities of each situation, and it is difficult for an outsider to grasp the significance of each development for the trend toward harmonization of law and administration in Australia. On the basis of available evidence, their efforts in credit and trade practices run remarkably parallel to the diverse models of federalism employed in the consumer protection field in Canada. The national companies and securities scheme, however, clearly goes beyond our intergovernmental schemes, and its activities merit continuing study by Canadian policy makers.

Notes

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3. *Criminal Law Amendment Act, 1968–69*, S.C. 1968–69, c. 38, s. 116.
4. See now *Combines Investigation Act*, R.S.C. 1970, c. C–23 as amended, ss. 36, 36.1–37.3.
5. Ibid., s. 31.1 and *Rocois Construction Inc. v. Quebec Ready Mix Inc* . (1980), 105 D.L.R. (3d) 15 (F.C.) on appeal.
6. Director of Investigation and Research, Combines Investigation Act, *1981 Annual Report* (Ottawa: Minister of Supply and Services Canada, 1982), p. 71.
7. The Business Practices Act, 1974, S.O. 1974, c. 131.
8. Trade Practices Act, S.B.C. 1974, c. 96.
9. *The Unfair Trade Practices Act*, S.A. 1975, c. 33; *Business Practices Act*, S.P.E.I. 1977, c. 31; *The Trade Practices Act*, S. Nfld. 1978, c. 10; *Consumer Protection Act*, S.Q. 1978, c. 9.
10. Edward Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977), 15 Osgoode Hall L.J. 327 at pp. 333–34.
11. These three objectives are identified as "paramount in an effective system of sanctions in the unfair trade practice context" by Michael Trebilcock et al., *A Study on Consumer Misleading and Unfair Trade Practices* 2 Vols. (Ottawa: Information Canada, 1976), Vol. 1, p. 302.
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13. Ziegel and Cohen, *Political and Constitutional Basis*, p. 10.
14. Belobaba, *Unfair Trade Practices Legislation*, pp. 356–74.
15. Ziegel and Cohen, *Political and Constitutional Basis*, p. 12.

16. Trebilcock, Study on Consumer Practices.
17. Ziegel and Cohen, *Political and Constitutional Basis*.
18. Ibid., at pp. 111–14.
19. *Proceedings*, Federal-Provincial Meeting of Deputy Ministers of Consumer Affairs, May 16–17, 1977, Toronto (mimeo.), pp. 30–31 (hereinafter 1977 *Proceedings*).
20. Ibid., at p. 35.
21. Ibid.
22. Bill C–16, given first reading October 17, 1976.
23. *1977 Proceedings*, p. 30.
24. Neilson, *Administrative Remedies*, pp. 165–66.
25. *1981 Annual Report*, Appendix 2; "$1 million fine puts ad world on notice," *Financial Post*, July 16, 1983, p. 12, concerning the fine levied against Simpsons-Sears Ltd.
26. Evident from perusing recent annual reports of the Director of Investigation and Research.
27. 1981 Annual Report, p. 71.
28. Louis Romero, *Federal-Provincial Relations in the Field of Consumer Protection* (Ottawa: Consumer Research Council, 1975), pp. 50–51.
29. 1977 *Proceedings*, pp. 12–17. See also discussion on BDPA in third and final sections of this paper.
30. See generally, Jacob Ziegel, "Recent Developments in Canadian Consumer Credit Law" (1973), 36 Mod. L.R. 479.
31. For example, *Debtor Assistance Act*, S.B.C. 1974, c. 25 and *Bankruptcy Act*, R.S.C. 1970, c. B–3, Part X as amended.
32. Special Joint Committee of the Senate and House of Commons, *Report on Consumer Credit*, (Ottawa: Queen's Printer, 1967), p. 4.
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34. *Reference re Validity of Orderly Payment of Debts Act 1979* (*Alta.*), [1960] S.C.R. 571 (S.C.C.).
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36. Jacob Ziegel, "The Languishing Bankruptcy Bill" (1983), 7 Canadian Business Law Journal, at pp. 249–50.
37. *Bankruptcy Act*, R.S.C. 1970, c. B–3 as amended.
38. *Report of the Study Committee on Bankruptcy*, p. 91.
39. Interview, Mr. Jacques Brazeau, Superintendent of Bankruptcy, December 14, 1983. See also his *Guidelines and Standards for Consumer Proposals*, November 1983.
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43. Jacob Ziegel and Ben Geva, *Commercial and Consumer Transactions*; *Cases, Text and Materials* (Toronto: Emond-Montgomery, 1981), at p. 1156.
44. For further discussion see Kerr, "Scope of Federal Power."
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46. Re Reciprocal Insurance Legislation, [1924] 1 D.L.R. 789 (J.C.P.C.).
47. Peter Behie, "*R. v. Canadian National Transportation Ltd.*: A New Era for Canadian Competition Policy?" Term paper, Faculty of Law, University of Victoria, 1983, p. 11.
48. Ibid., p. 12; also Kerr, "Scope of Federal Power," at p. 126.
49. Behie, "*Canadian National*," at p. 15.

50. *Canadian National Transportation Ltd. v. Attorney General of Canada* (1983), 49 N.R. 241.
51. Ibid., at p. 276.
52. It was applied in *BBM Bureau of Measurement v. Director of Investigation and Research* (1984), 52 N.R. 137 (F.C.A.) re another section of the *Combines Investigation Act*.
53. The historical overview draws heavily upon Susan Burns, "The Borrowers and Depositors Protection Act: A Case History in Legislative Failure" (M.B.A. Thesis, University of British Columbia, 1981).
54. Harold Buchwald, "Consumer Protection in the Community: The Canadian Experience — An Overview" (1977–78), 2 Canadian Business Law Journal 182, at pp. 205–6; John Evans, "The Proposed Federal Borrowers and Depositors Protection Act" (1977–78), 2 Canadian Business Law Journal 382, at pp. 382–83.
55. Jack E. Wightman, *Comment*, Proceedings of the Seventh Annual Workshop on Commercial and Consumer Law, edited by Jacob Ziegel (Toronto, 1979), at p. 99.
56. Burns, *Borrowers and Depositors Protection Act*, at p. 4.
57. Wightman, *Comment*.
58. Jacob Ziegel, *Comment*, Proceedings of the Seventh Annual Workshop on Commercial and Consumer Law, edited by Jacob Ziegel (Toronto, 1979), at p. 88.
59. Ralph Lewis, "Bill C–16," *Borrowers and Depositors Protection Act: A Provincial Perspective*, Workshop, at p. 107.
60. Ziegel, *Comment*, at p. 89.
61. Lewis, Workshop, at p. 107.
62. Quoted in Lewis, Workshop, at p. 107.
63. Ziegel, Workshop, at p. 88.
64. See Burns, Borrowers and Depositors Protection Act, for example, at pp. 288–89.
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66. Ibid., at p. 236.
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93. Ibid.
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117. Ibid., at p. 571.
118. Ibid., at p. 573.
119. Ibid.
120. Ibid., at pp. 571–72.
121. Ibid., at p. 572.
122. Goldring, *Unification*, at p. 321.
123. Minister for Home Affairs and Environment, "Consumer Protection Legislation–Proposed Amendments," News Release, February 21, 1984, p. 4.
124. Ibid.
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126. Much of the following is drawn from Goldring, "Unification," at p. 317; Goldring and Maher, *Consumer Protection*, at p. 321; Senate Standing Committee, *Reforming the Law*, at pp. 83–84.
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128. See for example, Richard E. McGarvie and Simon W. Begg, "The Implementation of Fair Consumer Credit Laws" (1971), 45 Australian Law Journal 708; C. Turner, "Avoidance of the Operation of the Australian Hire-Purchase Legislation and the Development of Alternative Instalment Credit Contracts, Part II" (1974), 48 Australian Law Journal 134; "Bank Credit Cards" (1974), 48 Australian Law Journal 514.
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135. Hon. W. Fife, then Minister for Business and Consumer Affairs, *Commonwealth Parliamentary Debates*, House of Representatives August 20, 1979, at p. 655 as quoted in R.Y. Wettenhall, "Quangos, Quagos and the Problems of Non-Ministerial Organization" in G.R. Curnow and C. Saunders, eds., *Quangos: The Australian Experience* (Sydney: Hale and Iremonger, 1983), at pp. 40–41.

3

The Harmonization of School Legislation in Canada: *Elementary and Secondary Levels*

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Introduction

The purpose of this introductory section is to set the scene on the legal and jurisdictional framework of elementary and secondary school legislation in Canada, and then to outline the paper's methodology, arrangement and content. The principal subject matter of the paper concerns kindergarten through grade 12 or 13, although some parts have relevance to post-secondary and adult education.

Canada's constitutional history has resulted in 11 different education jurisdictions across the nation: the ten provinces and the federal responsibility for Yukon Territory, Northwest Territories, and schools on federal lands. Within these 11 independent jurisdictions there are many school systems, since some provinces have two school systems — public and separate — and the two territories have their own school ordinances. As a corollary of this constitutional arrangement, with each province having the exclusive power "to make laws in relation to Education" (section 93, Constitution Act, 1867), it is generally accepted that, despite the federal government's considerable interest and involvement in Canadian education, the imposition of harmonization of the relevant legislation would be impractical. The provinces have made it clear ever since Confederation that they wish to maintain their jurisdiction in education matters.

Nevertheless, considerable harmonization is evident in basic elementary and secondary school legislation in Canada. This has arisen in part through historical precedent; for example, Egerton Ryerson's influence on Ontario legislation in the mid-19th century continues to be apparent in the school acts of several provinces. Some harmonization has resulted also from the highly developed systems of information interchange and consultation that exist at virtually all levels of the educational system in Canada. Ministers, ministry officials, trustees, school district officials, superintendents, principals and teachers all have their own formal organizations at the interprovincial level. There is also a myriad of informal networks, including a plethora of journals and magazines. There is even some interchange of education legislation information between groups and jurisdictions in Canada and the United States, France and the United Kingdom, presumably as a result of similarities in their societies and

cultures, and the excellent systems of communications between them.

Looking beyond the basic statutes and ordinances governing our elementary and secondary schools, some significant distinctions appear in the provincial and territorial laws expressed through regulations, directives and administrative and quasi-judicial rulings. The most notable are those which may become apparent to a family moving from one province or territory to another. Such differences include:

- standards for grade entries and graduation;
- core courses and curriculum objectives;
- special education facilities and services;
- teacher qualification requirements and workloads;
- local educational priorities, e.g., areas having a large immigrant population whose first language is not English or French;
- entitlements (rights) for students, e.g., the availability of kindergarten and vocational training;
- provisions for instruction in physical education, music and the arts, and cultural studies; and
- availability of free denominational (separate) schools and public funding for independent (private) schools.

Public awareness of these distinctions appears to have been heightened in recent years, both because of the increased mobility of Canada's population (particularly that portion in the child-rearing years) and because of the greater emphasis now placed upon materialism within Western society, reflected in current concepts of the goals of education. An example here is the attention and funding being afforded microcomputers in certain education jurisdictions because of the actual and anticipated effects of computerization upon the nature of the workplace. Because these practical concerns reflect laws made at the regulatory or decree level within the provinces and territories, the definition of education legislation adopted for this paper includes statutes, ordinances, regulations, directives, administrative and quasi-judicial decisions and local by-laws.

Within the constitutional and legislative parameters outlined above, it is reasonable to presume two major objectives for increased harmonization of education legislation in Canada: to increase the equality of educational opportunity among persons of school age; and to coordinate further the schools' educational goals and purposes and also their achievement standards. These are adopted by this paper as the underlying objectives of harmonization, while recognizing that harmonization may not be desirable for some aspects of education legislation governing school operations which require local adaptability and initiative.

By adopting these two major objectives for increased harmonization of education legislation in Canada, this paper excludes itself from the continuing debates among educators, politicians and the general public, concerning education policies, education finance and what currently ought to be taking place in the schools. Rather, this paper considers the constitutional and legislative changes that may help ensure greater equality of educational opportunity and could facilitate the identification and adoption by the appropriate bodies of the educational goals, policies and financial arrangements appropriate for Canada's future.

To achieve that more specific and legalistic objective, the paper examines:

- current levels of harmonization in education legislation throughout Canada in appropriate areas of concern;
- existing mechanisms and proposals to facilitate harmonization;
- underlying factors and trends inimical to increased harmonization; and
- the case for and against increased harmonization of elementary and secondary school legislation in Canada.

The last section contains recommendations and proposals.

This sequence is designed to facilitate the paper's review of harmonization, not of education. During the examination of some of the above items, certain arrangements, experiences and publicly held beliefs concerning the schools are described and are intended as illustrations of what *is*, not what *ought* to be. Certain persons may not agree that a description represents the particular situation in their region or their experience; nevertheless, every effort has been made to present a balanced picture, while recognizing that provincial and regional variations do take place in a country as heterogeneous as Canada, and in an activity as diversified as education.

Current Levels of Harmonization in School Legislation

Thirty-five statutes and ordinances have been identified as directly relevant to elementary and secondary school operations in Canada (listed in Appendix A). Other statutes, such as teacher pensions acts, are less relevant; while a third group, such as where teacher salary bargaining is governed by a general labour relations act, is relevant only in part. Examples of all three categories of relevance may be found in the statutes of most provinces.

It was decided that this paper should consider only legislation of direct relevance and that which applies primarily to all or part of school operations. No legislation is included that is not administered by the relevant minister of education, although not all legislation so administered is

directly relevant to school operations. The 35 statutes and ordinances listed, together with the literally hundreds of regulations and directives that accompany them, constitute the substantive subject matter of this paper. Even with this restricted compilation, only the most important of school operations were selected for examination and comparison. These selected areas are:

- curriculum determination;
- grade entry and graduation standards;
- special education facilities and services;
- teacher qualifications and workloads;
- educational priorities and entitlements; and
- free denominational (separate) schools and public funding for independent (private) schools.

These are believed to be the most critical areas for equality of educational opportunity, and for the coordination of educational goals and standards.

Curriculum Determination

Curriculum is customarily defined as an organized statement of goals and intended learning outcomes, traditionally made by elected representatives of the public, that serves as the structure for learning activities within the schools. Instruction is what actually takes place, under the direction of professional educators, in order to achieve those specified outcomes. It may be said that curriculum involves ends, while instruction concerns means.

Curriculum is one of the most important matters to be decided for any school system, because it is the raison d'être of the school. Ideally, it reflects and influences society's development, and the updating and expansion of curriculum is and should be a continuous activity and concern for each jurisdiction.

The legislative provisions governing the establishment of elementary and secondary school curricula across Canada are fundamentally the same in all provinces and territories. Each provides for centrally prescribed courses and textbooks, with opportunities for local authorities to add to and vary the prescribed core curriculum under central supervision and control. Two examples of such legislation are attached as Appendix B.

The objective of this central prescription of a core curriculum, with provision for locally approved courses to supplement and vary the core, is to address an inherent conflict in public expectations. That conflict is the broadly held public belief that there should be uniformity of curriculum throughout a province or a territory, but also that the curriculum should meet localized and special group needs and interests. In consequence,

most provinces and many school boards have ad hoc curriculum committees to keep in touch with technical and societal developments and with public opinion.

There is also a broad public expectation of uniformity of curriculum across Canada, at least to the extent that a student moving from one jurisdiction to another may pick up on his core studies where he left off. Perhaps it should be emphasized here that the term "core" usually covers more than the 3 Rs; core has been defined as "the fundamental skills and knowledge that every able child should acquire."[1] To meet this expectation of uniformity, the provinces have attempted to coordinate their core curricula. The premiers, at their 1981 conference in Victoria, requested the ministers of education to "accelerate efforts to develop a more compatible core curriculum . . . and to facilitate the transfer [of students] more freely from one education system to another."

Under the auspices of the Council of Ministers of Education, Canada (CMEC), there have been attempts to increase interprovincial curriculum compatibility and to help improve student transferability. In addition, information has been exchanged between provinces on emerging courses such as environment, family life, Canadian studies, computers, English and French as second languages, and programs for exceptional children. The third edition of the CMEC booklet, *Secondary Education in Canada — A Student Transfer Guide*, has had 10,000 English copies and 3,000 French copies distributed across Canada to school principals, counsellors and curriculum specialists. The CMEC is also helping to bring about greater coordination throughout Canada in curriculum resources, such as textbooks and other learning materials.

Nevertheless, it should not be forgotten that a fundamental purpose of CMEC is to preserve the existing provincial autonomy in education. In its 1979 paper, "Definitions, Assumptions and Trends in Core Curriculum in the Provinces," the council concluded that a common curriculum could not be achieved in Canada because of provincial differences in curriculum development, implementation processes and current curriculum content. These same obstacles to a common core curriculum across Canada still exist.

To summarize to this point: similar, basic legislation exists across Canada governing curriculum in the schools, with significant coordination of the specific regulations and directives. Differences in core subjects do, and likely will continue to, exist because of the nature of the various jurisdictions. An expeditious solution would be legislation or formal agreement to centralize curriculum decision making throughout Canada, but such a course does not appear feasible either politically or technically. A more pragmatic approach to the problem might be to leave the existing legislative arrangements untouched and work toward increased integration of curriculum across Canada through improved, centralized research and more effective and widespread communications and consultation.

While there may be general agreement in principle across Canada concerning the social and cultural purposes of education, specific agreement on curriculum matters is harder to achieve. The problem of appropriate curriculum content is being intensified by current technological developments and those developments which are expected to take place in the next few decades. It is widely predicted that, as a result of these technological developments, we are entering the post-industrial society, and some indications may be discerned of the need for radical restructuring of core curricula to meet the requirements of the year 2000 and beyond.

Because of the complexity of the curriculum content problem and the restraints on provincial and territorial spending, it is unlikely that any one of the provinces or territories can mount the necessary program of research, analysis and development needed to generate the required curriculum. It is evident that there is a need for close collaboration, and for the development and provision, through a central agency, of the necessary programs. Moreover, the use of such a central agency need not result in loss of provincial autonomy, because widely circulated information and broad discussion and persuasion would be used to gain acceptance for an updated, integrated core curriculum across Canada. There would still be room for provincial and local variations within the total curriculum.

With regard to these provincial and local variations, it is noteworthy that in the U.S.S.R., a country which is currently planning to overhaul its school system and increase its curriculum's emphasis upon science and technology in order to create a more technically skilled workforce, provision is to be maintained for considering the wishes of the parents, the individual development of the child, and local conditions. Similarly, in France, which is undergoing a review of its already highly centralized education system, the objective is described in the recent report of Minister of Education Alain Savary as a school system "national without being uniform." It appears that local educational needs and desires make themselves heard in other parts of the world as well as in Canada.

The question of how to establish the structures that will help generate the optimum relevance and integration of curriculum across Canada is addressed more specifically at the conclusion of this paper, in the section containing recommendations and proposals.

Grade Entry and Graduation Standards

This section of the paper examines Canada's legislative provisions governing the availability of public school education in relation to students' ages and grades of instruction. It also reviews the legislative provisions relevant to student achievement standards, namely grade completions and graduation. Both the availability of education and the standards for

achievement are of critical importance to the student and to society, with potential employers and post-secondary institutions having special interests in student achievement standards.

All governments in Canada accept that accessibility to free elementary and secondary education is a fundamental right for resident children, with only a few exceptions authorized by the legislatures, such as student suspension for misbehaviour or exclusion because of exposure to communicable disease. This fundamental right, or entitlement, is included in the school statutes of all Canadian jurisdictions, although in some it is expressed as an obligation to attend the school facilities which school boards are required to provide by the same statute. For example, sections 96(2) and 37 (j)(k) of the Northwest Territories' Education Ordinance read as follows:

> 96(2) Except as provided in this section, every parent, guardian or other person having charge of a child shall cause the child to attend school during the academic year in which the child is resident in an education district in which a school is operating.
>
> 37 Every Board of Education shall . . . (j) provide, maintain and furnish school buildings . . . . (k) recruit and appoint principals, teaching personnel and other staff for the education programs of the district.

An example of a more positive assertion of a child's entitlement to public schooling is contained in section 144(1) of Saskatchewan's Education Act:

> 144(1) . . . every person between the ages of six and 21 years shall have the right to attend school in the division in which he or his parents or guardian are residents, and to receive instruction appropriate to his age and level of educational achievement. . . .

With two exceptions, 12 to 15 years of free elementary and secondary schooling covering 12 to 13 grades of instruction are available across Canada, commencing for children at age six. Quebec and Newfoundland are the two exceptions, as neither has grade 12 in its school system. In addition, many school districts provide kindergarten for five-year-olds, either at the discretion of each school board as in Ontario (section 150 (1)(14), Education Act), or as an obligation for all school boards, as in British Columbia (School Act regulation 100).

Compulsory attendance generally is limited throughout Canada to children between the ages of 6 and 15 inclusive, although in British Columbia children need only attend school from their 7th birthday to the day before their 15th (section 113, School Act).

Where a child lives a considerable distance from the nearest public school with an appropriate grade, the majority of school boards in Canada have the statutory power to provide transportation and/or dormitories. Should age and distance create a serious attendance problem for a child, provincial correspondence courses generally are available

with any fees being paid by the school district in which the child is resident.

Appendix C is a comparative table of legislative provisions governing the availability of public schooling in each of the provinces and territories. Overall, they appear to provide a patchwork quilt of entitlements across Canada, rather than a homogeneous blanket. The variations from one province or territory to another, however, are not believed to be discriminatory or critical in their practical effects, particularly in view of the steady demise of grade 13 in the few provinces which have provided this post-secondary grade. (The demise follows the expansion of regional college and other post-secondary facilities so as to avoid duplication. Grade 13 still persists in Ontario.) Also, grade 12 equivalent is provided in Quebec in the widely available junior or community colleges, while Newfoundland is moving to a grade 12 provision. In addition, there are some concerns expressed in Prince Edward Island and New Brunswick concerning the absence of publicly funded kindergartens.

Most of the current variations in public school entitlements across Canada appear to result from the different historical development patterns in each education system, or from differences in the geographic dispersal of students (the tundra versus metropolitan Toronto). It also appears that few children, if any, in Canada are denied a reasonable educational opportunity by legislative intent. Nevertheless, greater standardization of the fundamental entitlements and obligations would help to ensure equity to the greatest extent that Canada's geography allows, and would allow greater understanding of the education system by parents, students and society generally.

The above legislative review, and the conclusions based upon it, concern only access to public school accommodation and tuition; there are no written guarantees as to quality of instruction or academic results. While Canadian courts have, on occasion, interpreted and enforced certain legislative provisions to ensure equitable availability of school accommodation and tuition (leading cases are *Wilkinson v. Thomas* [1928] 2 W.W.R. 700 (Sask. K.B.) and *McLeod v. Salmon Arm School Board* [1952] 2 D.L.R. 562 (B.C. C.A.)), there appears to be no Canadian judicial decision concerning the quality or effectiveness of the instruction provided. Even professional educators, never mind legislative draughtsmen, have difficulty in specifying the educational standards to be maintained in public schools, particularly in relation to the individual student. To provide such legal guarantees would appear impracticable.

The problems inherent in attempting to identify, measure and label educational standards in the public schools, in a manner that is meaningful to society generally, appear to have manifested themselves in current widespread concerns over grade promotions and high school graduation. The concerns being expressed by parents, students, post-secondary institutions and potential employers appear to boil down to one question:

What does it mean in functional terms when a student completes a grade, or achieves high school graduation? There is some evidence that grade promotion and graduation standards do not consistently take into account educational achievement, while the phenomenon of "grade inflation" appears to be widespread.

Grade promotion policies in the public schools (what determines whether a student shall advance from one grade to the next), are not conducive to inclusion in statutes or regulations because of their inherent complexity. Unless, unfashionably, such a policy declares that a student must pass a certain examination or demonstrate some other measurable accomplishment, it is usually contained in an administrative ruling or guide. An example of the latter is on pp. 513–14 of the *Administrative Handbook for Elementary and Secondary Schools* issued by the B.C. Ministry of Education, in which 13 separate factors and considerations are included in the grade promotion guidelines for the province's public schools.

The trend across Canada during the past 10 to 15 years has been to give precedence to social and psychological factors in grade promotion policies, and to delegate the responsibility for setting standards to individual schools. As Friesen, Farrine and Meek state (1980, p. 55):

> With respect to promotion, elementary schools have generally accepted a philosophy of continuous progress in education; students annually advance from one grade to the next. The practice of "failing" a student and having him or her repeat a grade has been abandoned — teachers at each grade level are expected to provide for the different achievement levels of students. In many cases, the term "grade" has been replaced with "year" as a more appropriate description of the promotional policies under the new philosophy.
>
> Secondary schools have switched from grade promotions to course promotions. Students thus do not fail a year but are given credit for courses they "passed" and denied credit for courses that they have "failed." With the abolition of province-wide exams, the number of students who fail to gain credit for a course they have taken has dropped considerably.

The difficulty in encapsulating this philosophy in legislation is obvious, with harmonization a virtual impossibility. In addition, this philosophy has come under scrutiny recently, as educators and the general public express concerns over the consequences of social promotion policies that may result in students completing grade 10, for example, despite being functionally illiterate. Attempts are being made in several Canadian jurisdictions to bring more objectivity and measurable standards into grade promotion policies through testing and measuring the educational progress of students. Ideally, such assessment will be coupled with remedial action and continuous reassessment for those students found not to be making the required progress. The end result could be a swing to grade promotion policies that require a student to complete a specified

stage of core learning, thus earning the right to attempt the next stage, before being promoted. More speculative, still, is the possibility that such policies may be included in each jurisdiction's educational legislation and that any such legislative provisions might be consistent across Canada. Clearly, there would be certain benefits for society if such a consistent legislative pattern were established. But strong oppostion may be expected from those persons who believe that, for the sake of the students, grade promotion should not be dependent on measurable factors common to all.

High school graduation standards have become, in recent years, a matter of concern throughout North America. These concerns centre on alleged inadequacies in the standards and inconsistencies in their application. Canada certainly has its share of horror stories concerning high school graduates who proceed to university and have to take remedial English or other core subject classes in order to function as university undergraduates. Such instances create not only personal disappointment and frustration, but also are a waste of scarce educational resources. An editorial in *The Globe and Mail* of December 27, 1983, states that:

> It is a waste of expertise and public money when a university is persuaded to accept large numbers of students who are inadequately educated in high school to benefit from its courses. . . . The School of Computer Science at Ottawa's Carleton University has presented a shocking example of this waste. The school has 62 places in its computer program. Last year it received 2,400 applications for its first-year class. It selected its students on the basis of the marks their high schools had awarded them. Most of them had graduated from high school with averages of 80 or more. Yet only half of them passed their university courses . . . [which] wasted half the student places in a course essential to an improved Canadian economic performance.

To what extent these concerns are justified is a matter for argument; however, they do exist and need to be taken into account.

The responsibility for the awarding or denying of graduation certificates in Canada generally has been delegated to each secondary school, with administrative guidelines issued by the various ministries of education specifying successful completion of a certain number and mix of grade 11 and 12 courses as the relevant criteria. The decisions on successful completions by individual students are usually made on the basis of teacher evaluations of the student's year-round performance. In consequence, there is a lack of consistent evaluation standards among schools within an educational jurisdiction, as well as distinctions between course criteria from one jurisdiction to another. Except as a general indicator of some scholarship, high school graduation across Canada is considered by many to be almost meaningless as an indicator of specific academic achievement.

The weaknesses inherent in the present graduation systems have been recognized and, at the January 1984 meeting of the Council of Ministers of Education, Canada, the chairman announced a major study of student achievement evaluation policies. This followed the announcement by the Ontario Ministry of Education, in late 1983, of plans "to increase compulsory academic requirements for a high school diploma, to evaluate students' work more closely and to ensure a more uniform educational program across the province." Also, British Columbia's minister of education announced, in August 1983, an immediate return to provincial examinations in grade 12 academic subjects, with the results counting for 50 percent of a student's final standing. The minister stated, in his August 31 news release, that "it is important that we return to centrally marked provincial examinations to ensure that there is a consistent measurement of the quality of education in the province." (Provincial high school examinations also currently take place in Alberta and Quebec.)

There appears to be a broadening acceptance throughout Canada that more specific educational standards should apply to the award of school leaving certificates and diplomas and that these standards should be publicized. It is believed that publication would help make students more aware of their educational goals, while post-secondary institutions and potential employers would have more explicit indications of what the certificate or diploma signifies. It is also becoming more generally accepted that there would be considerable societal, and possibly educational, advantages if these standards were the same across Canada.

It is doubtful that the changes in grade promotion and graduation policies outlined above would be assisted by increased harmonization of legislation, because such legislation appears capable of only an enabling role in this field. As with the implementation of a Canada-wide core curriculum, the best hope for similar grade promotion and graduation policies across Canada appears to be through closer collaboration between the jurisdictions, effected through a central clearing house or agency that could also mount an appropriate program of research and publication.

Special Education Facilities and Services

The term "special education" is most easily described by listing its typical constituent programs. Traditionally, special education has been restricted to specialized schools, or separate classes in standard public schools, for the mentally or physically handicapped. Provincially owned and operated schools for the visually and aurally impaired have been common in Canada as well as special schools for the mentally retarded, operated in many cases by the provincial associations for the retarded. In addition, there have been special classes within standard public schools

for the less severely handicapped or retarded, these being tightly controlled and regulated by provincial authorities. Some of these special schools and classes still exist, but there has been a trend during the past 15 years toward the integration of these students into the mainstream of public education.

Today, however, special education incorporates a legion of programs in addition to those for the physically and mentally handicapped. Examples are:

- learning assistance programs, including enriched programs for the gifted student;
- programs for the hospital- and home-bound students;
- programs to meet the learning needs of native Indian children attending public schools;
- programs for children of recent immigrants whose first language is neither French nor English;
- work experience programs for those students not proceeding to post-secondary institutions;
- alternative programs for school drop-outs, including pregnant students; and
- French-immersion programs for English-speaking students.

(While not everyone may agree that work experience programs and French-immersion are special education, this categorization is adopted for the purposes of this paper.)

These non-traditional programs are almost always the responsibility of the local school board, with additional funding and other assistance being provided by the provincial ministries of education, health, human resources, or labour. In the case of French-immersion courses, the federal Secretary of State has provided seed money and assistance. Frequently the impetus for these programs comes from within the local community where the needs are known and can be responded to most effectively.

Considered in their totality, special education programs are believed to be an important part of public school education in Canada, both because of their role in helping provide equity among students, and for their specialized contribution to the social development and prosperity of the country. The national program to reduce ghettoization among groups such as the handicapped, recent immigrants and native Indians, is heavily dependent on special education programs provided through school boards.

It is interesting to note that during the expansion in recent years of special education programs, there have been some significant changes in provincial legislation to ensure that all school districts provide basic programs. For example, Newfoundland added section 12 (a.1) to its School Act in 1979:

> Subject to this Act and the regulations, every School Board shall organize the means of instructing children who for any physical or mental cause require special classes, either by the establishment of special classes in its schools or by making arrangements with another School Board or with any educational body or authority within Canada for the education of such children.

Prior to section 12(a.1), the Newfoundland Act provided that "Every school board *may* establish special classes. . . ." (emphasis added).

Similarly, Ontario introduced mandatory provision of special classes in 1979, so that section 149(7) of the province's Education Act currently reads:

> Every board shall, before the 1st day of September, 1985, provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services. . . .

Regulation 274, 1980, as amended, under the Ontario Education Act provides that each board shall prepare a plan to implement section 149(7) in accordance with a provincial planning guide, to be reviewed by the minister of education.

Not all other provinces have such clear legislative provisions. British Columbia, for example, has no overt requirement in the School Act for school boards to provide special programs, that duty being legislatively founded in section 155(1)(a)(i), which states that all school boards shall "provide sufficient school accommodation and tuition, free of charge, to all children of school age resident in that school district." Also, section 160(h) authorizes school boards to operate special classes for the mentally retarded with the minister's approval. The regulations under the British Columbia School Act then specify the provincial funding to be provided for special programs approved under the regulations that are "established and operated in accordance with requirements of the ministry.'

As stated earlier, the effect of these legislative provisions appears to be the provision by school boards of mainstream (i.e., regular classroom) special programs and special classes for the physically and mentally handicapped, while the motivating force for many of the newer, less standardized programs has come from the boards' local communities. Changes that have taken place in community attitudes and beliefs have been put to practical use at the school district level, provided that the provincial legislation has been sufficiently flexible to accommodate them. Some examples follow to illustrate the importance of local initiatives in these newer, less standardized programs.

In Victoria, an Options for Pregnant Teenagers, a Girls' Alternative Program, was implemented by the public school board in 1971 to provide education programs for girls no longer attending regular school. Enrollment fluctuates between 40 and 50, and student ages vary from 14 to 19.

The program is accommodated in houses rather than schools, because the students do not wish to attend schools. Much of the initiative for the program comes from the local Girls' Alternative Society.

Another example of the importance of the changes in public attitudes during recent years relates to the education of native Indians. It is now expected in some parts of Canada that public schools which accommodate significant numbers of native Indian students will provide not only programs to teach standard subject matter, but also programs that reflect the students' cultural, linguistic and social background. Indeed, in 1973, School District No. 93 (Nisgha) was created in northern British Columbia from a large portion of an existing school district, partly to provide greater opportunity for the majority Indian population in No. 93 to develop appropriate programs and yet remain in the public school system.

One of the problems in maintaining a comprehensive special education program is the cost over and above that of a standard program. In 1984, the Council of Ministers of Education, Canada, was planning a study of special education costs in relation to anticipated results, and the results of this study could assist the provinces and territories in weighing the marginal utility of a dollar spent on special programs against the same spending on standard programs. There also may be areas in special education in which the federal government could assist financially without violating the Constitution.[2] While such spending might induce schizophrenia in some provincial capitals, without this federal assistance the pendulum of educational spending priorities is likely to swing away from special education, particularly in a period of financial restraint.

It appears that harmonization of legislation could be beneficial in regard to school board duties to provide basic, special programs. This could be reinforced by standard legislated entitlements to special education for all children with physical, mental or learning problems. As suggested earlier, however, many non-traditional special education programs are not amenable to standardization of program delivery, even within a single jurisdiction. As long as a reasonable national consensus exists on the need for local varieties of special programs, over and above the basic special programs, the most effective first step toward greater efficiency and coordination could be centralized research and information exchange on services, programs and costs.

Teacher Qualifications and Workloads

For the purposes of this paper, there are three principal concerns relating to teachers:

- the level of teacher qualifications and experience;
- the supply of appropriately qualified teachers; and
- teacher workloads, or the pupil-teacher ratio (PTR).

With only a few specific exceptions, all public school legislation in Canada provides that only certified teachers may teach in public schools. Certificates of qualification provide a continuing authority to teach until the certificate expires or is withdrawn. The authority to issue or deny certificates lies with the respective Lieutenant Governor in Council, minister of education or, in Yukon, the superintendent of education. Some statutes do contain broad requirements for certification; for example, section 146 of the British Columbia School Act states that a certificate shall be issued only to a person who "is of good moral character and a fit and proper person to be granted a certificate." In practice, each province and territory has detailed regulations governing its requirements for certification, with academic qualifications being checked and certificates being awarded by special divisions or branches of the ministry of education. There is considerable variety both in the number of categories and the required qualifications for the certificates. These categories and qualifications are summarized in Appendix D. Six provinces (Alberta, Manitoba, Ontario, Quebec, New Brunswick and Prince Edward Island) require all permanent certificate holders to have a university degree, while the other provinces and the territories provide for standard as well as professional (university-degree) certificates. The number of teachers in Canada with a university degree has grown steadily since World War II, and it is expected that all permanent teachers in Canada soon will need this qualification. There are also provisions for specified-term interim and probationary certificates in most jurisdictions and some technical and vocational teaching certificates. Heavy reliance is placed upon the universities with regard to the quality of certificated teachers, as it is their degrees and diplomas that play a key role in the classification process.

Overall, the teacher certification regulations in Canada appear byzantine in their complexity. This uncoordinated mass of regulations creates not only comprehension difficulties, but also some interprovincial/territorial teacher mobility obstacles. The problems have been recognized by the jurisdictions across the country, and in 1982 the Council of Ministers of Education, Canada, approved in principle the Canada-wide portability of teachers' certificates. Certified teachers wishing to teach in another jurisdiction would have to provide proof of the following:

- a valid teaching certificate issued by a provincial or territorial government;
- a three- or four-year degree awarded by a university accredited by a provincial government; and
- successful completion of one year of teacher training, or equivalent, as attested by a teacher-training institution accredited by a provincial or territorial government.

To date, it appears that only four provinces (Alberta, Ontario, New Brunswick and Prince Edward Island) have formally accepted the plan, so that applicants meeting the criteria above may receive the appropriate interim certificate. Some jurisdictions appear loath to reduce their autonomy, while teachers' collective agreements and lack of pension portability create additional obstacles to Canada-wide teacher mobility. (Despite their special legislation in most jurisdictions, teachers' pensions are considered here as part of the overall subject of pension portability in Canada, and therefore outside the scope of this paper.)

The level and adequacy of teacher qualifications and training are dependent on provincial/territorial regulations and on the degrees and diplomas awarded by educational institutions. It is inevitable that the jurisdictions and school districts which offer the most attractive teaching and living conditions are able to attract and retain the most highly qualified teachers. They are also able to attract teachers whose subject specialty is temporarily in short supply; current examples are French and computer technology. Nevertheless, these teacher-attractive jurisdictions and school districts have problems: few teachers resign to teach elsewhere, so there are limited opportunities for young, energetic innovators, while the relative cost of an older, more highly qualified staff impinges on other educational expenditures. (It is also suggested in some quarters that the correlation between academic qualifications and teaching ability has never been proved.) These problems of securing appropriately trained teachers to meet classroom subject requirements and of maintaining the desired balance of experienced and younger teachers would be reduced, although not resolved, by Canada-wide portability of teacher certification. Better still, perhaps, would be a single national system of teacher certification in Canada, although such a proposal might cause flutterings in the dovecotes of some teacher education and certification establishments.

The overall supply of qualified teachers, both with regard to numbers and appropriate subject specialties, is a continuing problem in Canada. Some western provinces and the territories were, until the late 1970s, recruiting significant numbers of teachers in Australia, the United Kingdom and the United States. Today many Canadian-trained teachers are unable to find employment because the demand fell as the supply increased. There are currently some predictions that, in a further five

years, parts of Canada will be faced with an increased demand for teachers as the echo baby boom makes its effects felt. To quote from the B.C. Central Credit Union's "Economic Analysis" of January 1984 (prepared by its economics department, a highly professional and respected independent source of information in that province):

> Births in B.C. from 1981 to 1983 are 25,000 in aggregate (20%) ahead of the 1971 to 1973 period. Increases of this nature will be a profound effect on our health care, school system, retail trade, and eventually, on all aspects of our economy. The echo baby boom is real and appears to be well entrenched for the balance of the 1980's.

Leaving to one side such things as the birth rate per 1,000 and the general fertility rate of women 15 to 44, and looking only at the number of live births per year in B.C., the figures below seem to confirm the above observations:

Year	Number of live births in B.C.	Year	Number of live births in B.C.
1971	34,852	1981	41,679
1972	34,563	1982	42,942
1973	34,352	1983	43,090
	103,767		127,711

It is likely that the increase in the number of live births is attributable to the increase in the general population. The birth rate per 1,000 may have declined, but there are more thousands and hence the actual number of live births has increased.

The present heterogeneous and uncoordinated system of teacher education in Canada is governed to a considerable extent by the short-term financial exigencies of the provinces and by the commitments of the teacher-training institutions in established subject areas. In this situation, there appears little hope for overall forecasting, planning and action to meet the nation's teaching needs during the last decade of this century or the first decade of the next.

Teachers' workloads, or in broad terms the pupil-teacher ratio, (PTR), is a subject of continuing concern in Canada. The richer, more teacher-attractive jurisdictions and school districts tend to have lower PTRs, although the PTR apparently is also influenced by spending priorities, by the political effectiveness of the relevant provincial and school district teacher associations, and by the local level of teacher salaries. A further complexity in some parts of Canada is the argument over whether a lower PTR is or is not beneficial for students.

The PTR varies significantly across Canada and, in many quarters, the PTR — or more significantly, the classroom ratio — is believed to be of considerable importance to the quality of education provided. While

some differences in PTR arise from geography and student dispersal, the principal factors are the spending priorities of each province or territory and, to a more limited extent, those of the individual district. No jurisdiction, in view of transfer payments, equalization grants and the differing levels of teacher salaries, can argue that financing is the long-term cause of differences in the PTR. Rather, it results from how each jurisdiction chooses to spend its revenues and the priority that the PTR receives within education spending.

To summarize this section of the paper, there is a need in Canada for a more coordinated or common system of teacher certification to facilitate comprehension of standards and interprovincial mobility of teachers. There is also a need for central forecasting, planning and coordinated action in order to meet the nation's teacher requirements in the future. The numbers of students and subject matters taught will change considerably by the year 1990 and we cannot afford to wait until the further changes anticipated for 2000. Finally, there is a need for a centralized research and publicizing of findings concerning the educational significance of teacher workloads, in an attempt to bring increased rationality into Canada's existing ad hoc method of determining its PTRs.

Educational Priorities and Entitlements

Public school education has many purposes and objectives: to inculcate society's mores, to furnish religious instruction, to ensure cultural preservation, to confer a liberal education, to provide training for work. Individual citizens may have a different scale of priorities for these purposes and possibly some additions of their own. Indeed, it is argued by some educators that these many-faceted expectations create a major problem, with the school system ending up as a jack of all trades and master of none. Nevertheless, a broad consensus apparently exists in Canada to the effect that the general social and cultural purposes of the schools are believed primary, for that is what makes up the principal content of Canada's core curricula. Beyond these cores, strong disagreement emerges on the place, if any, of such subjects as physical and health education, music and the arts, second languages and technical/vocational education.

Among these peripheral subjects, the greatest attention today is given to the teaching of French, consequent upon national and political priorities, and to the provision of technical/vocational training, in view of the current economic situation. Still, a few comments would be in order concerning physical education and fine arts. The legislation is meagre governing physical education, music and art courses. Some provision for these subjects is included in certain core curricula as, for example, under Goal M (skills and knowledge for healthful living) in British Columbia's Core Curriculum Regulation 325/77. While physical education usually extends from grades 1 to 11, formal music and art classes gravitate to the

intermediate grades. Later, because the needs of students in the fine arts vary from locality to locality, they tend to be met through district- or even school-developed courses that may take place outside normal school hours. A major problem for physical education and fine arts courses in Canada is provision of specialized facilities and instruction in the nation's many small schools. In consequence, the only schools with adequate programs in these subject areas tend to be the large city or suburban schools, particularly those where the parents are articulate, interested in recreation and the fine arts, politically skilful and able to afford to subsidize such school activities as their child's ski trip or visit to a concert. Geography and social stratum of the school district and individual school appear to be the determining factors here, with the harmonization of physical education and fine arts curricula legislation having limited potential to bring about increased equity for students or the standardization of educational goals in these subjects.

These same two factors, geography and social stratum of the school district and individual school, have an important role to play in second-language courses. Under consideration here is not the provision of classes in English or French for linguistic minorities, because legislation on that subject is now harmonized under section 23 of Canada's Charter of Rights, although the section's application to Quebec schools has been in dispute before the Supreme Court of Canada. (It is interesting to note that the exclusive power to make education laws, granted to the provinces in 1867 and reaffirmed in 1981, is constrained by sections 23 and 29 of the Charter; see Appendix E. This creates a precedent for possible future amendments to the Charter that, in effect, could harmonize certain education legislation. The only other supra-provincial authority in education matters would appear to be Article 26 of the United Nations' Universal Declaration of Human Rights and that, despite Canada being a signatory to the declaration, is perhaps more of a moral than a legal limitation. As Article 26 is also referred to later in this paper and is not well known generally, it is also included in Appendix E.)

To return to second-language courses, the primary subject matter here is French immersion, and instruction in French or English classes. There appears to be little legislation in Canada governing their provision, although it is the subject of policies in several provinces. In Quebec, French has been compulsory for many years for those attending English-language schools, and the province now has under consideration a proposal for compulsory English classes for French-speaking students in grades 4 to 10. Other provinces have had no second-language requirement in high schools since the early 1970s. In these latter provinces, geographically isolated districts and schools find it difficult to stimulate the required initiative and to provide the tuition for French instruction or immersion courses, particularly in western areas of Canada where French-speaking teachers are scarce. In certain more densely populated,

predominantly anglophone areas it has become fashionable and potentially profitable[3] for one's child to be a French-immersion student. Again, it seems that articulate and politically astute parents are often a prerequisite for such classes to be provided. In consequence, the harmonization of provincial and territorial legislation regarding French instruction and immersion classes appears impractical and likely to be ineffective. Without massive injections of money, it appears that the location of the school district and the school, as well as the social stratum of the parents, will continue to be the determining factors in the offering of French-immersion classes.

Turning to technical/vocational training in the schools, a major debate has been underway in Canada for several decades. Should technical/vocational education be a part of the schools' core courses, or a peripheral subject, or not taught in the schools at all? This debate is part of the larger discussion concerning the purpose of the public school system; in particular, what should be in the core curriculum. As stated earlier, there appears to have been an effective but not unanimous decision that the core curricula should concentrate on social and cultural purposes, thus leaving technical/vocational training as peripheral subjects. It is argued by many that a liberal arts and science education not only meets general educational needs but also serves work purposes by helping to cope with technological change. Others criticize the schools for directing students to the "white-collar or so-called clean professions and not to the manufacturing industries" (Canadian Machine Builders' Association, submission to the Royal Commission, December 5, 1983).

During the late 1950s, North America recognized with consternation that it was losing its technological leadership over the Russians, the Japanese and certain Western European countries. Dramatized by Sputnik, there was hard evidence in Canada's economic downturn, rising unemployment, and the fact that Canadian youth could not compete for the available jobs with the 1950s influx of skilled immigrants. A major political and social reaction was the Technical and Vocational Training Assistance Act in 1960, which financed new vocational schools and additions to existing public schools. It was a clear federal intrusion into the provinces' constitutional preserve. To quote from Wilson (1981, pp. 18, 19): "The federal resources were a godsend and made possible an unprecedented expansion of facilities," with Ontario taking the fullest advantage while "other provinces moved more slowly and modestly to secure the federal largesse." (British Columbia's government of the day, for example, was reluctant to participate in the program as far as secondary schools were concerned, but did develop post-secondary technical and vocational institutes whenever it could.)

While Canada's new post-secondary technical and vocational institutes were relatively successful, the programs in the secondary schools apparently suffered from lack of articulation with the needs of business and

industry and with the post-secondary courses. There were some suggestions that an academic bias within the scholastic establishment also became apparent. Regardless, in very few places in Canada did technical/vocational training become a principal objective of the public schools. Some trade schools flourish today, usually for students 15 years or older; and some basically academic and some comprehensive schools have significant vocational programs, for example, in Ontario and Saskatchewan. However, except for some flurries of concern during downturns in the economy, such technical/vocational training currently exists essentially as addenda to the school systems. With the notable exception of business and commercial training, effective technical/vocational training, geared to specific employment, takes place in Canada principally at the post-secondary level.

Turning to the various legislative provisions of the provinces and territories for technical and/or vocational training at the secondary level, this takes the form of separate statutes, such as New Brunswick's Trade Schools Act (1969) and Prince Edward Island's Trade Schools Act (1974); and as parts of the jurisdiction's principal school legislation, as with section 54–B of Nova Scotia's Education Act and sections 152–3 of Ontario's Education Act. This latter legislation is primarily permissive, whereby the ministers of education or the school boards may establish and operate training facilities. This enables the school systems to vary the extent of their participation in technical and vocational training over periods of time, in response to perceived needs and political imperatives.

Once more, there appears to be little point in attempting to achieve harmonization of the legislation in the absence of a national consensus or policy on a secure role for specific technical/vocational training in the schools. Should such a consensus develop, or effective national policy emerge, then there could be justification for Canada-wide harmonization of the appropriate legislation, both to provide equity of student opportunity and to ensure that the required national standard is achieved.

Independent and Separate Schools

There are in Canada many independent schools[4] which operate outside the public systems, mainly because of a religious element in their curricula, or because of objections among parents to particular aspects of the public system, or because the schools operate on federal property such as Indian lands.

Certain jurisdictions provide for religious schools within the public system (indeed, the continued existence of such schools is guaranteed under section 93 of the Constitution Act of 1867 if they were operating within a province when it entered Confederation or were later established by its legislature — see Appendix F). Other provinces provide for a secular or a non-denominational system only. The legislation governing

the various arrangements in each jurisdiction is complex (see Appendix G), but following is a summary of the major provisions.

Ontario, Saskatchewan, Alberta, the Northwest Territories and Yukon provide for separate schools within their public school system. To quote from Bargen (1961, p. 14):

> Legally, separate schools are public schools of a special kind. They are legally provided for by provincial statute as part of the public school system, and are managed by a legally recognized class of persons belonging to a particular religious minority. In Canada this minority is generally Roman Catholic, although if the majority of inhabitants in any area are Catholic, a Protestant separate school may be established there. All separate schools, however, are and remain an integral part of the public school system and are subject to control by the same central authorities.

Quebec has a dual public school system, presently Roman Catholic and Protestant but, under the terms of Bill 3, introduced in 1984, to become francophone and anglophone. Following the 1964 establishment of Quebec's Ministry of Education, the autonomy of the two groups has steadily diminished, so that now there is virtually one public school system catering to the province's two principal religious denominations.

Newfoundland has a truly denominational public school system, with five groups (Schedule to Schools Act) all operating under one central provincial authority: Integrated Districts (Anglican Church, United Church and Salvation Army); Roman Catholic Districts; Pentecostal Assemblies of Newfoundland District; Seventh-Day Adventist District; and Presbyterian District.

Each of these groups operates its own schools where numbers of students of the appropriate faith are sufficient. Should none of the groups wish to operate a school in a particular locality, then the Department of Education fills the vacuum by providing and, if necessary, operating a school (section 48(3) Schools Act).

New Brunswick, Prince Edward Island and Nova Scotia officially have non-sectarian public school systems, but have administrative arrangements for the full or partial funding of denominational schools. To quote from Manley-Casimir (1982, p. 7) concerning these provinces:

> Officially there is a single non-sectarian public school system; alternatives to it are voluntarily funded by sponsors and parents. In practice, however, political compromises and administrative leeway allowed such schools to receive state funds with varying degrees of state supervision attached.

Until 1977, British Columbia provided no funding for denominational schools as then, and now, its public school system is strictly secular (section 164 School Act). Passage of the School Support (Independent) Act in 1977, however, has provided for up to 30 percent of public school funding for private schools, provided that the provincial core curriculum,

and some other general standards, are adopted in the school. Independent schools may apply for the funding and accept the legislated requirements, or decide to remain fully autonomous and receive no funding.

Manitoba has a non-sectarian public school system, although since 1980 section 60(5) of its Public Schools Act has provided for limited grants to private schools in respect of instruction and services where the minister is satisfied that the school teaches approved courses and that the teachers are certified. A private school is defined in section 1 of the Education Administration Act as "any school, other than a public school, which provides a curriculum and a standard of education equivalent to that provided by the public schools. . . ." Section 60(1)(4) of the Public Schools Act also provides for public school boards to enter into agreements with private schools to provide transportation and for the use of the public school district's facilities and resources, with the school district receiving provincial funding for this.

To summarize, across Canada there is a wide range of levels of financial support for denominational and independent schools and of their degrees of conformity with provincial educational standards. Even the separate school picture is not consistent because, as the result of an idiosyncrasy in the Ontario political and constitutional scene, provincial support of the principally Roman Catholic separate schools is currently cut off after grade 10, although a prospective change was announced in 1984. Certainly there is inequality of education funding and opportunity, as well as divergence of education goals and standards. The complexities have their roots in pre-Confederation history, and in the religious and ethnic mosaic of each province and territory. It would be a brave, possibly foolhardy, politician who would attempt to achieve harmonization of the relevant legislation. Perhaps a more practical resolution of the problem lies in recent developments concerning independent schools in Canada and new attitudes toward home schooling.

Every province and territory permits independent schools to operate within its boundaries. There is a complete gamut of legislative controls, from Newfoundland's requirement of approval by the minister of education before an independent school may operate there (section 68, Schools Act), through Ontario's provision for inspection and monitoring by the Ministry of Education, but with no stated power other than to inspect and monitor (section 15, Education Act), to the complete absence of legislated educational controls on private schools such as in British Columbia except where an independent school elects to apply for funding under the School Support (Independent) Act.

More and more jurisdictions are providing for funding of approved independent schools (see Appendix G), and the number of students attending such schools is growing rapidly, while public school enrolments are declining. In the ten years from 1972–73 to 1982–83, a period of

declining student population, public school enrolment in Canada declined from 5.6 million to 4.7 million, while independent schools went up from 152,000 to 226,000,[5] and the same trend toward independent schools is believed likely through the 1980s. In British Columbia alone there are more than 28,000 students attending independent schools, almost 6 percent of total school students, although it must be remembered there are no separate schools for Roman Catholics in British Columbia. It is estimated that 15 percent of the independent school attendance in Canada is at traditional, elite establishments such as Upper Canada College (Wilson, 1981, p. 97). The other 85 percent is spread across a wide range of denominational schools, some fundamentalist and some with non-standardized educational methods, such as Montessori and Waldorf.

There are possibly three principal reasons for the recent expansion of independent schools: the growing dissatisfaction of many parents with the educational standards and values system (allegedly secular humanism) of public schools; the desire to generate competition for the public schools; and the wish to reduce the financial burdens on parents of independent school students.

Underlying this movement to independent schools is a wide recognition among parents and acceptance by society, that parents have the right to decide their child's education, in accordance with Article 26(3) of the United Nations' Declaration of Human Rights. Some advocates of freedom of choice are arguing the case for state educational vouchers which may be cashed in at any recognized educational institution in which parents may wish to enroll their children — a concept first advanced by Adam Smith in the late 18th century and developed in recent years by right-wing economists such as Milton Friedman in the United States and E.G. West in Canada.

There also has been some development of home schooling programs by organizations such as the Canadian Alliance of Home Schoolers, which estimates that a thousand families across the country have turned to home schooling for their children. Some use provincial correspondence courses. There has been increased tolerance of home schooling by educational authorities since the landmark case of *Lambton County Board of Education* v. *Beauchamp* (1979) 10 R.F.L.(2d), 354 (Ont. Prov. Ct.). This decision established that, under the wording of the Ontario act, the onus of proof was upon the educational authorities to demonstrate that the alternative education was unsatisfactory. This they had failed to do.

Under other legislative provisions, the parents may raise as a defence that the child is being educated by another satisfactory means, as for example in s.113(2)(a) of the School Act, B.C. To provide proof of satisfactory education, or lack thereof, may be difficult for many reasons, including variations in methods, course content, and effective teaching time per student. There may well be some reluctance on the part of

educational authorities to challenge home schooling except in those cases where little or no attempt has been made to provide adequate instruction.

A further example of the partial decentralizing and destructuring of education that is taking place in Canada is provided by federal government policies for the education of native Indians on Indian lands. The school system provided by the Department of Indian Affairs is gradually being replaced by outright federal grants to Indian bands to provide and operate their own schools. An example is Bella Bella, off the central coast of British Columbia, where the band school has adopted the provincial public school curriculum in part and has supplemented it heavily with locally developed courses of practical and cultural value to a west coast native fishing community.

The movement to freedom of choice has been eloquently described by Wilson (1981, p. 110) as follows:

> As we enter the 1980s, public education in Canada is under severe pressure. Enrollments are declining while popular criticism of the schools is rife. Competition with other public services for the tax dollar is intense. Meanwhile, the challenge of non-public education alternatives is greater than it has been in over a century. Freedom of choice, it is argued, should be the right of all parents not just those who dissent for religious reasons. We can therefore expect private and independent schools across Canada to press for more public aid in those provinces that already grant it, and for the rest to make comparable provisions. . . . Grouping[s] of parents with language, ethno-cultural or educational interests not currently served in public or grant-aided private schools are likely to emerge and demand support in a version of Canadian educational pluralism unmatched since the pre-public school era of the mid-19th century. That support may take the form of the present statutes and regulations or even tuition tax credits or vouchers. . . . In any case it seems safe to predict that the pluralism of Canadian society made official in the 1970s by a government policy of multiculturalism will be further reflected in a multiplicity of non-public educational institutions receiving various forms of public aid throughout the 1980s.

At first sight, the movement to increased freedom of choice in Canadian education may seem contrary to the harmonization concept. But it could be argued that some state assistance to parents who are determined not to have their children educated in public schools may not only help reduce inequalities in educational opportunities but also assist with standardization of goals. To the extent that assistance is provided by provinces, such aid is almost invariably contingent upon use of the provincial/territorial core curriculum and other basic requirements, thereby increasing conformity within the jurisdiction in just those areas where harmonization is particularly desirable and where it has the greatest Canada-wide potential. Without conformity within each jurisdiction, harmonization between the provinces and territories becomes more difficult to achieve and is of reduced potential value.

Mechanisms that Facilitate Harmonization

There are no mechanisms in Canada that have harmonization of education legislation as a primary objective. There are, however, several interprovincial organizations which facilitate information exchange and thus help develop more consonant legislation among the Canadian educational jurisdictions. This section reviews these interprovincial organizations, the harmonization effects of federal government interventions in education, and the Charter of Rights and Freedoms. It should be noted that there is no educational organization in Canada which adopts a national perspective and pursues national educational objectives.

Canadian Education Association

Founded in 1870 as the Dominion Education Association, the Canadian Education Association (CEA) is the oldest of the Canadian educational organizations. It perhaps also comes the closest to being a national body. It is essentially a meeting ground for professional educators, including public servants, to exchange information and discuss mutual problems. It has offices in Toronto with a small executive staff. The officers are elected at the annual general meeting, the president usually being a deputy or assistant deputy minister of education. The board of directors provides for regional representation. In addition to organizing educational leadership conferences and courses, the CEA mounts special studies (e.g., public involvement in school operations, financed by Imperial Oil in 1979) and publishes selected books, directories, calendars of upcoming events in education, and a monthly newsletter September to June. The newsletters concentrate heavily on educational developments in the provinces and territories, including legislation. The CEA also played a prominent role in helping to facilitate the 1975 review of Canada's educational policies by the Paris-based Organization for Economic Cooperation and Development (OECD).

Through both its formal programs and the informal networks that develop around CEA, it is one of the most potent policy-advisory forces working toward harmonization of education legislation in Canada. There is a natural tendency in a federation such as Canada for professions in each member jurisdiction to keep up with the perceived leader or leaders to the extent that geography, finances and the philosophies of the political masters of each jurisdiction allow.

Originally the ministers of education of the provinces participated informally in certain CEA activities, but in 1960 the Standing Committee of Ministers of Education (SCME) was formed to consult on matters of common interest and to make recommendations to the CEA board of directors. The SCME rapidly developed into a self-governing body for

dealings with interprovincial associations of teachers and school trustees, and with the federal government. In 1967 it became a separate organization.

Council of Ministers of Education, Canada

At the inception in 1967 of the Council of Ministers of Education, Canada (CMEC), it was made clear that none of its recommendations or decisions would be binding on any of its members. Its declared objects were to enable the ministers to consult and cooperate in areas of mutual interest and concern and to "cooperate with other educational organizations in ways to promote the development of education in Canada." The federal government is not represented on the council, even in view of its responsibility for Indians and Department of National Defence (DND) personnel, although the territories attend as "participant/observers."

Since 1967 there has been a steady growth in the Council's operations and its status, and it now has permanent offices and staff in Toronto, with meetings organized for deputy ministers and other provincial education officials as well as ministers. In 1981–82 the ministers met five times, the deputies had 10 meetings and other provincial officials held 45 meetings under the CMEC aegis.[6] Some of the matters discussed were portability of teachers' certificates; post-secondary education finance; computers in education; French-language education, and social studies programs. As part of the CMEC's primary purposes of information exchange and interprovincial cooperation, it represents the common interests of the provinces at meetings with the federal government. It also signs protocols for bilateral agreements with the federal government on such matters as minority-language education.

The CMEC has a great potential to help establish common education goals and priorities throughout Canada, and thereby effect harmonization of education legislation. But it should not be forgotten that one of its declared purposes is to ensure that provincial constitutional rights in education are respected, facilitated and maintained.

Canadian Teachers' Federation

In 1920, the provincial teachers' associations of the four Western provinces and Ontario formed the Canadian Teachers' Federation (CTF). All other provincial associations of teachers joined by 1927 and, after some initial CTF dealings with individual teachers, the federation settled into its present pattern of working for and through its affiliate associations.

There is an elected president, two vice presidents, and a board of directors. Offices and a permanent staff are located in Ottawa and, in

addition to representing teachers at the national and international (World Confederation of Organizations of the Teaching Profession) levels, the federation is involved in research on such matters as education finance and professional status of teachers. Because it can provide Canada-wide information to its member associations on subjects including curriculum and teacher certification, the associations use its information to help in their lobbying of provincial/territorial governments. In this way, the CTF has considerable potential to increase harmonization of education legislation. It also has the capacity to lobby at the national level through CMEC and the federal Secretary of State's office, incorporating a global perspective where required. The CTF favours an increased federal role in education.

Canadian School Trustees Association

The Canadian School Trustees Association (CSTA) was founded in 1923 and now has a small office and staff in Ottawa. Its membership consists of non-Catholic, public school boards of each province. Members of the board of directors and the table officers are elected at the CSTA annual general meetings.

The CSTA provides a meeting ground and common voice for trustees across Canada and makes representations to the federal government and to members of Parliament on national concerns of the trustees, including the CSTA's view that there should be a stronger federal presence in education matters. It also maintains contact with the National School Board Association (NSBA) in the United States.

Catholic school trustee associations belong to the Canadian Catholic School Trustee Association (CSTA).

Federal Secretary of State's Office

There is a long history of federal government involvement in education, despite Canada's constitution. Such involvement came about "through a series of pragmatic responses to challenges which, by their sheer magnitude or by virtue of their national character, appeared to many Canadians to require action on the part of the Government of Canada."[7]

In 1966, the Education Support Branch of the Secretary of State's department was formed to coordinate these federal actions. The involvement typically provides a fiscal contribution for such educational programs as technical and vocational training (Technical and Vocational Training Assistance Act, 1960); cost-sharing for post-secondary education which includes grades 12 and 13 in some of the schools; student aid, and bilingualism programs. Including the federal government's direct responsibility for education on federal lands (Indian, National Defence and National Parks), expenditures directed toward education by the

Canadian government in 1982–83 totalled $6.4 billion, principally for post-secondary education. These expenditures influence the education policies of the provinces and territories, and consequently their legislation.

Although some view this federal involvement as an intrusion upon provincial autonomy and questions have been raised as to its constitutionality, all provinces and territories now take full advantage of the funding provided, and expectations of continuing and increased funding have arisen. There are, of course, criticisms that the educational priorities virtually imposed by conditional funding are not those the individual jurisdictions might choose for themselves. For example, British Columbia was reluctant to accept funding for schools under the vocational training program in the 1960s, while Alberta and Ontario took full advantage of it apparently because the funding was available. Also, federal funding for certain programs has been asserted by some critics to have been available only for a limited period of time and that, consequently, there was no effective basis upon which to develop a school course, recruit specialized staff and rearrange the total curriculum. (To be fair, some support funds have been consistent over a reasonable period of time, while others were offered as seed money. Also, where funding is not conditional, it has been alleged that the federal funds have been diverted to other purposes.)

While conditional federal funding is an effective way of bringing about increased conformity in Canada's education program and thus greater harmonization of its education legislation, it may well be in the country's long-term interests if a consensus could be reached between the federal government and the education jurisdictions before implementing a specific program of conditional funding. Moreover, any such funding program should be guaranteed to the schools over a reasonable period of time.

Charter of Rights and Freedoms

The limited harmonization in education legislation brought about by Canada's constitution has already been reviewed, specifically section 93 of the Constitution Act, 1867, and sections 23 and 29 of the Charter of Rights and Freedoms (Constitution Act, 1982). Many persons, particularly some teachers and school trustees, were disappointed that education received virtually no attention during the many federal-provincial conferences that led up to the Constitution Act of 1982 and the Charter. Perhaps the political dangers of tampering with section 93 of the 1867 Act, as intimated in Chapter 29 of the 1972 Report of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (see Appendix H), were sufficient to deter attempts to

provide for national education policies beyond minority language and separate school rights.

Nevertheless, the Charter of Rights has resulted in most provinces forming committees or assigning lawyers to sift through all their legislation to ensure that it complies with the Charter's requirements. Consequently, some movement toward increased harmonization of education legislation may be expected of the Charter with regard to individual rights. Indeed, there are many predictions that, when the Charter becomes fully operational in April 1985, and equality rights come into effect, there will be a flood of education litigation based upon section 2 (fundamental freedoms), sections 7–14 (legal rights) and section 15 (equality rights).

Magsino (1982, p. 38) has identified four potential areas of contention: teachers' rights, rights of denominational (independent) groups, parental rights and student rights. Should these predictions prove correct and the courts adopt a positive role in enforcing the Charter, then there may be a further movement toward the harmonization of education legislation in these subject areas. It should be noted, however, that Quebec has exempted its principal education legislation from sections 2, 7–15 of the Charter, under the "notwithstanding" provision of the Charter's section 33.

In view of the speculative nature of these predictions and the relative proportion of the totality of education legislation that may be affected, it is perhaps not worthwhile to provide more than a passing reference to the Charter as a mechanism for facilitating harmonization of the education legislation across Canada. Time alone will confirm or disaffirm the use of the Charter in regard to elementary and secondary education in Canada.

Factors Inimical to Increased Harmonization

The principal underlying factors inimical to increased harmonization of education legislation are derived from the fundamental nature of education and of Canada. Without consensus on objectives and policies, legislative congruence is not possible.

The philosophical debate over the role of the state versus the role of the parent in the education of school children has ebbed and flowed over the centuries. But the specific question of whether the state or the parent has the primary responsibility may never be fully resolved. The United Nations Declaration of Human Rights (see Appendix E), to which Canada was a signatory in 1948, asserts that parents have the prior right to choose the kind of education that shall be given to their children. But, since the mid-19th century, the state has been expected to provide for free compulsory education of schoolchildren, and clearly the state can provide only a certain range of options based upon the political consensus of the day. The dissatisfied parent must then seek alternative education,

with which the state may or may not assist, or approve. The interaction between these centralizing and decentralizing forces in education, in a free society, helps determine the degree of harmonization in education and its legislation.

Within Canada, the forces of social heterogeneity are perhaps stronger than in other countries such as the United Kingdom and France because of our nation's geography, history and ethnic mosaic. Many Canadians believe our country's diversity is one of its strengths, and that cultural assimilation is not a desirable objective. To quote from Thomas Berger, a former Justice of the Supreme Court of British Columbia (1982, pp. 6–7):

> Our Constitution has always recognized that we are a plural, not a monolithic society. This is what is best in the Canadian tradition. . . . It is our good fortune that we are not all of us of common descent, that we do not speak one language only. We are not cursed with a triumphant ideology; we are not given to mindless patriotism.
>
> For these reasons Canada is a difficult country to govern. There is no easy consensus. It would be simpler if we all spoke the same language, if all our children went to the same schools, if we all held the same religious beliefs, if we were all of us white. But we are not. Such diversity should not terrify us or provoke an epidemic of xenophobia. It is our strength, not our weakness.

Such eloquent statements notwithstanding, there is a cost to diversity in school operations and in outcomes. Readily apparent are the resource costs of operating a diversified and decentralized arrangement, and then there are the intangible costs of inconsistencies in such basic outcomes as core curriculum and graduation standards. Ideally, the economic benefits from diversity in education should be measured against the costs, and then rational decisions could be made for future developments. Following are some of the principal factors that are endemic in education, and in Canada, which inhibit such rational decision making:

- the differences in economic and cultural objectives that arise in a country as geographically vast and socially diverse as Canada — the fishermen of Bonavista, the autoworkers of Oshawa and the lumberjacks of Vancouver Island;
- the tradition of local involvement in education decision making (the institution of school boards was brought to Canada from its birthplace, the American colonies, by the United Empire Loyalists);
- the historically established position of sectarian and private schools in which the inculcation of religious and other values is esteemed as highly as teaching children how to make a living;
- the specialized, cultural needs of minority ethnic groups that are determined to preserve their identity;

- the specialized functional needs of recent immigrants from non-English speaking or non-French speaking countries: for example, English as a second language is a priority of the Vancouver school district because, in 1982, 46.5 percent of the district's total enrolment had English as a second language;
- the perceived constitutional limit on the federal government's involvement in education. There have been proposals for a federal department of education in Canada since the 1890s, but political considerations have consistently won out over the need for national education policies, even when that need has been identified by disinterested, outside observers, such as the Organization for Economic Cooperation and Development (OECD) in 1975;
- the continuing debate concerning the primary purposes of education (should children be given general grounding in communication skills and in the community's culture and mores, or should children be trained in specific job skills); and the lack of consensus over the priority that school systems should give to the arts and other adjuncts to a happy, satisfying lifestyle; and
- the strongly held belief in Canada that the individual parent has the final right to choose the kind of education that the child shall receive.

Despite these and other diversifying factors, a case can be made for increased harmonization of elementary and secondary school legislation in Canada in certain critically important areas. Canada's education system does not need to stay frozen in its present structural and operational pattern while Canadian society and the world change around it.

Arguments For and Against Harmonization

For any proposal on increased harmonization of school legislation in Canada to be considered in this paper, two conditions must be present. First, the proposal must appear to be economically, educationally and constitutionally feasible; second, the mechanism to carry out the harmonization must be readily at hand. In the past, the final barriers to harmonization of education legislation efforts in Canada appear to have been political, while the truism that "politics is the art of the possible" lives on.

It should be noted that complete harmonization of education legislation in Canada is neither possible nor desirable. The essence of Canada's school systems should be preserved. This includes the right to offer courses supplementary to the core in response to provincial or local needs, and the right of parents to opt out of the state system if it does not meet their needs. There are, however, certain functions of the nation's school systems where congruence of objectives, policies and legislation is

feasible and desirable and the most important of these will now be summarized. Later in the paper there will be comments on the practicality of their harmonization.

Core Curriculum

Although the provincial premiers recognized in 1981 the need for ministers of education to "accelerate efforts to develop a more compatible core curriculum . . . and to facilitate the transfer [of students] more freely from one education system to another," attempts to date by the ministers to achieve a common core curriculum do not appear to have been successful.

Despite the obvious need for such a common core curriculum in Canada, a consensual agreement between the educational jurisdictions in Canada is neither politically nor functionally possible. Even when working together under the auspices of the Council of Ministers of Education, Canada (CMEC), the provinces and territories appear to lack the resources necessary for the research to identify the elements for such core curricula as well as the political spur to overcome their fears of loss of autonomy.

It is proposed here, therefore, that the federal government undertake to finance a program of research, analysis and development of the core curricula that would meet Canada's needs for the rest of this century and beyond. Also, it is proposed that through a program of discussion and consultation, the federal government help to stimulate the desire among the provinces and territories to adopt such core curricula.

The proposed research program should be undertaken in collaboration with the provinces and territories, as well as with professional educators and the universities. Preferably, it would be mounted under the banner of the CMEC, provided that the provincial ministers of education would agree to permit federal initiative and participation in a CMEC project.

Should the proposal for joint research, discussion and consultation within the CMEC not prove fruitful, then the Canadian public could be informed of the federal government's concerns over the reluctance of the provinces and territories to develop common core curricula, and the public might be persuaded that the resolution of such national concerns will require the co-equal participation of the federal government. A new, national joint education organization could then be the research vehicle and a special task force could be established. Ongoing publication of the work of the research team and of its findings could help stimulate public interest, and the resulting national debate over educational issues (something which Canada has never enjoyed) might help to ensure the completion and eventual adoption of a national curriculum.

Indeed, as Walker et al. (1978, p. 23) suggests, the provinces and territories might find the means and the will to adopt more uniformity themselves, in order to deflate the uniformity rationale for any such federal incursion. In other words, they might do the research, develop and adopt the common core curriculum they need in order to head off federal involvement.

The disadvantages of such a federal initiative would probably be of a political nature, rather than educational or legislative. The critical factor would be the perception of the electorate of the need for a common core curriculum, and its perception concerning the extent to which federal involvement is justified.

Grade Entry and Graduation Standards

Hand in glove with the need for a common core curriculum in the schools of Canada is the need for more specific grade and high school graduation standards (what is needed to pass a grade) and a common set of high school graduation requirements (what courses need to be passed). Such standards and requirements would be of benefit to students, post-secondary education establishments, and potential employers. With regard to increased uniformity of the number of grades of instruction available to students and of services such as busing and correspondence courses to help make these grades widely available throughout each jurisdiction, it is believed that the legislatures and the courts have these problems well in hand. The absence of grade 12 in Quebec is not an inequity in view of the wide availability of junior or community colleges, known as CEGEPs (Collèges d'enseignement général et professionnel), while Newfoundland is moving toward an effective grade 12. Other measures to ensure consistency of fundamental entitlements in each jurisdiction likely will take place shortly, hastened perhaps by the perceived threat of court actions by disaffected students and parents under the provisions of section 15 of the Charter of Rights.

With respect to the need for more specific grade and graduation standards, the jurisdictions are aware of the problems and some are moving individually toward improvements. The CMEC is mounting a major study of student achievement evaluation policies. This subject area is, therefore, advancing slowly but fairly painlessly and cooperatively toward greater uniformity of policies and legislation.

It does not appear that the need to reduce inconsistencies in high school graduation requirements across Canada will be resolved by the jurisdictions themselves in the near future. Currently, no two jurisdictions appear to have the same set of graduation requirements. Some demand completion of twelve grade 11 and 12 courses, others require eleven, or ten, courses. Of the twelve courses currently needed in British Columbia, four are required (two in English, one in social studies and

one in physical education, health or guidance) and eight are electives. In Ontario, two grade 11 and 12 courses are required (both in English) and ten are electives (although changes are forecast here also). Various other permutations appear in the remaining jurisdictions. Clearly a common, or more nearly common, set of high school graduation requirements across Canada would be of benefit, but currently there appears to be little movement toward such uniformity. Both British Columbia and Ontario are considering proposals for changes to their requirements, but this work is not known to be coordinated in any way.

It is proposed here that the federal government take a similar initiative to that suggested for core curricula. If carried out under the auspices of the CMEC, it would help to bring about effective research and closer collaboration between the jurisdictions. Graduation requirements are an area of national interest and concern that may warrant federal intervention if that is absolutely necessary to break the logjam. Principal disadvantages of such intervention would likely be political.

Special Education Facilities and Services

There are essentially three categories of special education: separate schools for the severely physically and mentally handicapped students, usually owned and operated by the government of the jurisdiction; mainstream programs and special classes for the less severely physically and mentally handicapped students; and a variety of specialized programs to meet the localized needs of groups such as immigrants, pregnant students and slow learners.

While there are inconsistencies in the legislation governing the first two categories, there have been many changes in the past decade to upgrade the services provided and to provide them in the least restrictive environment. It appears that few major inequities continue in Canada. Also, the Charter of Rights is already providing the initiative to ensure a consistent national pattern of entitlements and, consequently, effective harmonization of the legislation should occur shortly.

With regard to specialized programs to meet local needs, the initiative to provide such programs usually arises at the community level. Provided that there is enabling legislation for school boards to provide such programs (which there appears to be across Canada) and there is adequate sustained funding (which is not so certain), then a minimal case may be made for increased harmonization. What is needed here, perhaps, is increased and sustained federal funding of particular special education programs in which a national interest and concern is justified. This may produce disquiet in some educational jurisdictions, but there is ample precedent for such funding by the federal government.

The need for centralized research and information exchange on service and program-related questions, including the cost effectiveness of existing programs, is currently under consideration by the CMEC. Federal participation in such a study would appear rational.

Teacher Qualifications and Workloads

A more coordinated system of teacher certification would facilitate comparison of qualifications, and would contribute to interprovincial mobility of teachers. In view of the CMEC initiative in 1982, which would provide for Canada-wide portability of teachers' certificates, and the fact that four provinces have formally accepted the plan to date, it would appear that effective harmonization may be anticipated in the 1980s.

Concerning the need for centralized forecasting, planning and action in the area of teacher manpower requirements in Canada, there is clearly a need and a constitutional basis (i.e., manpower) for federal participation. Such a program would flow in part from that proposed earlier concerning the core curriculum, because effective teacher training requires information regarding subjects that will be taught in the future.

Another area of research that invites federal initiative because of its national implications, and because of apparent inaction to date on the part of the education jurisdictions, is the educational significance of teacher workloads (PTRs) in the schools. Similarly, research is needed on such questions as whether the introduction of computers into the classroom will decrease or increase the need for teachers, and what skills these teachers should have. Without centralized research, how can Canada effectively plan for and provide the teachers needed in the 1990s and beyond?

Out of such research, forecasting and planning, more coordinated teacher qualification and workload policies should emerge in Canada and, in consequence, there could be increased harmonization of the relevant legislation. Again, the principal disadvantages, if any, would be political.

Educational Priorities and Entitlements

This subsection considers the pros and cons of harmonization of legislation relating to physical education, fine arts, French immersion and technical/vocational training.

The determining factors in provision of physical education and fine arts courses currently appear to be the geography and social stratum of the school district and the number of students served by the individual school. Legislative provisions are minimal, and it appears that little would be achieved in terms of increased equity for students, or coordination of goals and standards, by changes to the legislation. Within society's

current scale of priorities, the necessary public funding for more widespread physical education and fine arts courses is not available. The only students who currently enjoy effective programs are those where economies of scale allow for suitable facilities, and where the local electorate and parents are supportive of such programs. Federal funding, possibly through the Canada Council, directed to the rural areas and the North would be of benefit, but such provision is essentially a political question, and a question of interpretation regarding the Canada Council's mandate to broaden appreciation of the arts.

A very similar scenario applies to the provision of French immersion and instruction in French and English classes, except that Canadian society currently accords such programs a somewhat higher priority than physical education and fine arts courses. This higher priority is reflected in the specific federal funding that is already available for certain language instruction. To provide for more equitable treatment of students, however, and for more coordinated goals and standards across Canada, increased and sustained funding would be required. The harmonization of relevant legislation might then be effected.

Turning to technical and vocational training in the schools, there would be few benefits from harmonization of the existing, essentially permissive, legislation without significant changes in public attitudes and government policies. The history of specialized technical and vocational training in Canadian schools during the past 30 years suggests that this is a subject area best left for post-secondary education. Neither the will nor the sustained funding for effective job training has been available in most Canadian schools, except for business and commercial training.

Funding of Separate and Independent Schools

There has been a movement in recent years toward increased freedom of parental and student choice in Canadian elementary and secondary education. To attempt to restrict or reverse this trend in the interests of harmonization of education legislation would appear socially undesirable and politically impossible in a free society.

If public attitudes do not reverse course shortly, we may even see something similar to a voucher system in certain jurisdictions. Recent surveys by the Education Voucher Institute in Ann Arbor, Michigan, show that public support for the voucher concept in the United States grew from 38 percent in 1971 to 43 percent in 1981 to 51 percent in 1983. While these are U.S. figures, there is some evidence that the same belief that parents and students should be able to have an impact on schools by being able to choose among them is growing in Canada. For example, the currently governing party in British Columbia approved a resolution

favouring implementation of the voucher concept at its 1982 convention, although no legislative action has been taken by the provincial government.

It can be argued that if parents and students are determined to support non-standardized public and independent schools, then access to public funding, which provides for operating standards such as use of the core curriculum and employment of certificated teachers, will help reduce inequalities between students and assist in coordination of Canada's educational goals and standards. It appears that the educational jurisdictions are beginning to accept this philosophy, and any that do not may be forced to provide equal funding to separate and independent school students under the Charter of Rights and Freedoms. To quote, for example, from J. Magnet (1983, pp. 29–30):

> In Ontario, the new constitutional guarantees may require a massive transfer of funds from the public to the separate school system. Under the Charter, most parents in the separate school system qualify for public funding. They receive public funding to Grade 10, but at a greatly reduced rate. The Charter also guarantees to these parents "equal benefit of the law" (section 15 (1)). It is doubtful that the parents receive equal benefit of the law when they receive 50 cents of each tax dollar spent on education as contrasted with the anglophone majority which receives 150 cents of their dollar. Over the long term, the Constitution may require *complete* refinancing of Ontario's educational system (emphasis added).

Premier William Davis of Ontario announced in 1984 that equal funding would be provided for separate public schools, and that commissions would be established to examine school funding and independent schools in Ontario.

Exactly how the movement to increased freedom of choice will eventually affect the concepts of equity among students, coordinated educational goals and standards, and harmonization of education legislation is difficult to predict.

Summary and Conclusions

This paper has attempted to assess the potential for harmonization of elementary and secondary school legislation in Canada. It has identified the relevant legislation, assessed the degree of harmonization already existing, and reviewed certain critical areas of educational operations to identify the pros and cons of their increased coordination. The paper is based upon the premise that increased harmonization of the relevant legislation should not be imposed, but rather should result from agreement upon the coordination of educational goals and standards.

Within the educational jurisdictions in Canada, there are at least 35 statutes and ordinances of direct relevance to harmonization of legislation. There are also hundreds of regulations and directives pursuant to

the statutes and ordinances. The most that can be hoped for with this mass of legislation is effective harmonization, i.e., that the basic entitlements, goals and standards of the school systems be similar. To a considerable extent, such similarity already exists through historical factors and education's highly developed systems of information exchange. But there are significant distinctions in several areas of school operations that are critical to Canada's national development, and these have been examined within the context of two objectives:

- to increase the equality of educational opportunity among persons of school age; and
- to coordinate further the schools' educational goals, purposes and achievement standards.

Underlying this examination is, of course, the fundamental assumption that uniformity of laws is a desirable objective, because it "provides an element of national cohesion . . . encourages the development of common attitudes and patterns of ethical belief and conduct . . . [and] fosters greater familiarity of experience and expectation within a country characterized by diversity" (Walker et al., 1978, p. 20).

To be pragmatic, a piecemeal approach to increased harmonization of education operations, and consequently their legislation, is required within the existing political structure for governance of Canadian education. A blanket resolution of the problem is neither desirable nor practical and possibly would be counterproductive.

Using the piecemeal approach, some specific recommendations for helping to achieve increased equity and coordination of educational goals and standards were included earlier in this paper. In addition, broader conclusions and one main recommendation may now be advanced:

1. Certain entitlements, objectives and standards need to be common to all of Canada's school systems, but the opportunity must be available for local and provincial/territorial jurisdictions to respond to regional needs and aspirations. Parents must also have the freedom to choose the type of education that shall be given to their children.
2. The practical method to effect harmonization of entitlements, objectives and standards is by the process of information dispersal, consultation, and then consensual agreement. This process need not cause any loss of provincial autonomy. Indeed, local and provincial variations are possible and desirable.
3. There is a legitimate, if residual, constitutional basis for federal involvement in the operation of Canada's schools. The federal government has a role where there is a consensus that national objectives may need to be effected in or through the schools. The government can provide information through research, help to stim-

ulate public debate, and provide conditional funding where consensus is achieved.

4. Canada needs national education policies from which objectives for the nation's schools can be developed. The need for such policies was identified in 1971 by a Joint Committee of the House of Commons and the Senate; in 1975 by the OECD Review Team; and today it is even more apparent.
5. If the Council of Ministers of Education, Canada (CMEC), is to play a leading role in the future development of Canada's school system, provision should be made for federal involvement in its meetings. A national perspective needs to be brought into the CMEC deliberations.
6. One of the reasons Canada's school systems are not more fully harmonized is the absence of an ongoing national debate on the purposes and standards of the schools. (This reluctance to discuss education at the national level has been compared with Victorian attitudes to sex: clearly the subject exists, but we would rather not talk about it.) Ideas and information given publicity by a national debate are needed to stimulate public opinion on the future role of Canada's schools.

The Major Recommendation

In this paper, the need for greater conformity in several key areas of Canadian school operations has been noted, and specific recommendations have been made. The recommendations share one prerequisite: joint research, consultation and public debate. In view of this universal requirement, it is believed that the paper would not be complete without recommending at least a blueprint for the basic organizational arrangements.

Ideally, the vehicle for the research and consultation would be the Council of Ministers of Education, Canada. Indeed, it is suggested here that an outstanding initiative for the CMEC would be to convene a national conference to identify those areas of school operations which require harmonization, and to establish the mechanism and funding by which they could be researched within their current and future contexts. The obvious initial candidates for such identification are a national core curriculum, common grade standards and common graduation standards. Federal participation would be required, as would that of the educational associations and organizations identified earlier in this paper. There could also be advantages from inviting international participants in resource capacities. Should the CMEC be unable to amend its present policies and practices sufficiently to become the required national research and coordinating vehicle, then a completely new organization would become necessary.

This new organization would need similar prerequisites to those suggested for a CMEC initiative:

- joint federal, provincial and territorial participation;
- involvement of the educational associations and organizations identified earlier in this paper; and
- international input where required from countries dealing with similar problems to those in Canada.

Federal funding for the new organization might help overcome any hesitancy on the part of the other proposed participants. There would also be an overall saving for the taxpayers from a national program of educational policy research in Canada.

Regardless of whether a restructured CMEC or a new organization is required, it could benefit from the experiences of other countries. Almost all other federal countries throughout the world appear to have found it possible to coordinate their own national education policies more closely than is evident in Canada. Reviews[8] of such coordinating systems operating in Germany, the United States and Australia suggest that a Canadian system might be developed which, while drawing on other countries' experiences, could be structured to meet our unique national needs, and at the same time preserve provincial and local autonomies.

Briefly, in Germany there is a Standing Conference of Education Ministers (Kultusministerkonferenz) of the Länder which has a secretariat in Bonn and subcommittees for different educational areas. The Länder (provinces) have developed and implemented correlated policies in many of these areas, and, since 1964, the German federal ministry of education and the Länder have agreed on common school attendance and curriculum patterns. In the United States where, under the Tenth Amendment to the Constitution, the provision of education is the responsibility of the individual states, a federal Office of Education plays an important research, coordinating and funding[9] role in pursuit of national objectives through the schools. The Australian Commonwealth government provides much of the funding to assist the Australian states in fulfilling their legal responsibilities to provide education; in addition, through the Commonwealth School Commission, it has provided a forum for debate of educational policies, which is essential to the continuing identification of needs and priorities.

No country has found the perfect formula for the reconciliation of national, provincial and local objectives in education nor for the equitable sharing of responsibilities. But other countries with difficulties and impediments similar to those found in Canada do appear to have made significant progress.

Conclusion

Effective harmonization of selected education legislation is essential to Canada's future prosperity and the happiness of its citizens. The major obstacles to such harmonization are political, and the practical method to overcome such obstacles is a consultative and cooperative process, in which information is disseminated, ideas are discussed, and public consensus develops sufficiently for political action to be taken. In the light of recent experiences with other aspects of our Constitution, it is possible that informed public opinion could shift Canada's national educational logjam. Certainly, nothing else to date has come close to succeeding.

Appendix A
Statutes and Ordinances Directly Relevant to Canadian Schools

Alberta	School Act Department of Education Act Teaching Profession Act School Election Act School Building Act
British Columbia	School Act Education (Interim) Finance Act School Support (Independent) Act School District Housing Act
Manitoba	Public School Act Education Administration Act Teachers' Society Act
New Brunswick	School Act Auxiliary Classes Act Education of Aurally or Visually Handicapped Act
Newfoundland	School Act Department of Education and Youth Act School Attendance Act Education (Teacher Training) Act Teacher (Collective Bargaining) Act Local School Tax Act
Northwest Territories	Education Ordinance
Nova Scotia	Education Act Education Assistance Act School Boards Membership Act Teaching Profession Act
Ontario	Education Act School Board and Teachers Collective Negotiations Act Teaching Profession Act
Prince Edward Island	School Act
Quebec	Education Act Private Education Act
Saskatchewan	Education Act Teachers' Association Act
Yukon	School Act

Appendix B
Examples of Legislation Governing Curriculum Determination

British Columbia
(a) Section 15 (h) of the School Act states:

> The Lieutenant-Governor-in-Council may, by regulation, prescribe courses of study, adopt and prescribe textbooks and authorize supplementary readers and other instructional material for use in public schools.

Regulation 325/77 prescribes the contents of a 31-page document, "Guide to the Core Curriculum Regulation," which are in turn reinforced by curriculum guides on specific subject areas issued by the Curriculum Development Branch of the B.C. Ministry of Education. Regulation 405/83 lists the textbooks and materials to be used in effecting the core curriculum.
(b) Section 165 of the School Act states:

> Subject to the regulations, a [school] board may approve courses of study, textbooks, supplementary readers and other instructional materials for use in the public schools in the school district.

School Regulation, section 141, then provides that no approval by a school board under section 165 of the School Act takes effect unless the board has complied with procedures and received approvals contained in directives of the Minister of Education.

Ontario
Section 8 (1) of the Education Act states that the Minister may:

> (b) prescribe the courses of study that shall be taught and the courses of study that may be taught in the primary, junior, intermediate and senior divisions;
>
> (c) in respect of schools under the jurisdiction of a [school] board,
>
> (i) issue curriculum guidelines and require that courses of study be developed therefrom and establish procedures for the approval of courses of study that are not developed from such curriculum guidelines,
>
> (ii) prescribe areas of study and require that courses of study be grouped thereunder and establish procedures for the approval of alternative areas of study under which courses of study shall be grouped, and
>
> (iii) approve or permit boards to approve,
>
> a. courses of study that are not developed from such curriculum guidelines, and
>
> b. alternative areas of study under which courses of study shall be grouped,

and authorize such courses of study and areas of study to be used in lieu of or in addition to any prescribed course of study or area of study; . . . .

(f) select and approve for use in schools textbooks, library books, reference books, and other learning materials.

Appendix C
Legislative Provisions Governing the Availability of Public Schooling

Jurisdiction	School Age — right to attend (inclusive)	Compulsory attendance (inclusive)	Kindergarten early child-hood services program	Student transportation to and from school	Dormitories or board and lodging allowance	Free correspondence courses
Alberta	6 – 17[a]	6 – 15	X	X	X	X
British Columbia	6 – 18	7 – 14	X	X	X	X
Manitoba	6 – 21	7 – 15	X	X	X	X
New Brunswick	6 – 20	7 – 15	—	X	X	—
Newfoundland	6 – 17[b]	6 – 14	X	X	—	—
Northwest Territories	6 – 18	6 – 15	X	X	X	X
Nova Scotia	5 – 20	6 – 15	—	X	X	X
Ontario	6 – 20[c]	6 – 15	X	X	X	X
Prince Edward Island	6 – 20	8 – 15	X	X	—	—

Jurisdiction	School Age — right to attend (inclusive)	Compulsory attendance (inclusive)	Kindergarten early child-hood services program	Student transportation to and from school	Dormitories or board and lodging allowance	Free correspondence courses
Quebec	5 – 16[d]	6 – 15	X	X	–	–
Saskatchewan	6 – 21	7 – 15	X	X	X	X
Yukon	6 – 18	7 – 15	X	X	X	X

Notes: Except in the two columns concerning attendance, many of the legislative provisions are permissive rather than mandatory.

The blank spaces in the chart indicate that thorough reading of the relevant statutes and regulations did not locate a relevant statutory basis for the service listed.

a. School board may admit persons 18 years or older.

b. Currently is provision to Grade 11 only.

c. Provision to Grade 13.

d. Provision to Grade 11, then colleges (CEGEPs) become available.

Appendix D
Teacher Certification Authorities, Categories and Required Qualifications

Jurisdiction	Legal Authority	Delegated Responsibility	Certificates [a]	Qualifications
Alberta	Minister may make regulations regarding certification of teachers. S.7(1) (b) Department of Education Act	Registrar, Department of Education	Provisional — vocational	Journeyman's certificate and work experience, but no B.Ed.
			Professional	B.Ed., or other university degree plus one year teacher training
British Columbia	Lieutenant-Governor-in-Council may make regulations. S.4(h) School Act. Power delegated to Minister by regulations 376/74 and 531/79	Director of Teacher Services, Ministry of Education	Teaching licence — temporary	One-two years post-secondary courses
			Instructor's diploma	Vocational qualifications and teacher training courses
			Standard	Three-four years post-secondary courses plus one year teacher training
			Professional	University degree plus or including one year teacher training

Jurisdiction	Legal Authority	Delegated Responsibility	Certificates [a]	Qualifications
Manitoba	Minister may issue teacher certificates as he prescribes. S.6(1) Education Administration Act.	Director of Teacher Certification and Records, Department of Education	Special certificate — vocational	Grade 12 plus work experience and teacher training
			Professional — provisional and permanent after 2–6 years or if Manitoba graduate	B.Ed., or university degree plus one year teacher training
New Brunswick	Lieutenant-Governor-in-Council may make regulations for the certification of teachers. S.10(2) Schools Act	Director, Teacher Certification, Department of Education	Letter of standing — vocational	Grade 12 plus work experience and teacher training
			Letter of authority — temporary	University degree and teacher training
			Certificate 4 — permanent	University degree and teacher training
			Certificate 5 — permanent	Master's degree and teacher training
			Certificate 6 — permanent	Certificate 5 plus five graduate courses in one subject

Jurisdiction	Legal Authority	Delegated Responsibility	Certificates [a]	Qualifications
Newfoundland	Teacher Certification Committee may make regulations subject to approval of Lieutenant-Governor-in-Council. S.12 Education (Teacher Training) Act	Registrar, Teacher Certification and Records, Department of Education	Permits — temporary and in special fields only	University degree
			Certificates 2 – 4	2–4 years post-secondary education plus teacher training
			Certificates 5 – 7	University degree, M.A. or doctorate plus teacher training
Northwest Territories	The Executive member has charge of and is responsible for teacher certification and classification S.3(4)(m)	Registrar, Support Services Branch, Department of Education	Standard K – 9	Two years teacher training
			Professional K – 12	B.Ed., or university degree plus one year teacher training
Nova Scotia	Governor-in-Council may make regulations governing teacher certification. S.3(a)(iv) Education Act	Registrar, Division of Teacher Education, Department of Education	Class 4	Grade 12 plus teaching diploma
			Class 5	University degree plus one year teacher training
			Class 6	Class 5 plus Master's degree
			Class 7	Class 5 plus two years additional study, or Class 6 plus one year

Jurisdiction	Legal Authority	Delegated Responsibility	Certificates [a]	Qualifications
			Class 8	Class 6 plus doctorate
Ontario	Minister subject to approval of Lieutenant-Governor-in Council, makes regulations. S.10(1) (11) Education Act	Teacher Education Branch, Minister of Colleges and Universities	Ontario Teacher's Certificate, with subject assignments marked on Teacher's Qualification Record Card	University degree plus one year of teacher training, or satisfactory "technological qualification" (see Ontario Regulation 269 under the Education Act).
			Principal's Certificate	Master's or doctorate, 5 years teaching in Ontario, plus supervision, etc., courses
Prince Edward Island	Minister may establish categories and classes. S.9(a) School Act	Registrar, Educational Services, Department of Education	Certificate 4	B.Ed. or equivalent
			Certificate 5	University degree plus one year teacher training
			Certificate 5A	Certificate 5 plus one year of additional study
			Certificate 6	Certificate 5 plus M.A.

Jurisdiction	Legal Authority	Delegated Responsibility	Certificates [a]	Qualifications
Quebec	Minister shall prepare the regulations governing teacher qualifications and certificates for teaching personnel. S.30(b) Conseil Supérieur de l'Education	Direction de la certification des maitres	Teaching permit — temporary	B.Ed. or university degree plus teaching certificate
			Teaching Diploma	
			(Both specify teaching level and concentration regarding subject matter)	
Saskatchewan	Minister shall make regulations for classification and certification of teachers. S.9(g) Education Act.	Chief, Teacher Services Development Division, Department of Education	Vocational/ Technical	Grade 12, work experience of technical qualification, plus one year of teacher training
			Standard A and B	Grade 12 plus three years of teacher training, or two years plus one of specialized post-secondary education
			Professional A and B	B.Ed. or specialized degree plus 48 semester hours of "professional education"

Jurisdiction	Legal Authority	Delegated Responsibility	Certificates [a]	Qualifications
Yukon	Superintendent of Education shall have charge of issuing teacher certificates. S.6(1)(e) School Ordinance	Assistance Deputy Minister of education	Certificate	Grade 12 plus two years of post-secondary education and a valid teaching certificate or letter of eligibility from a Province.

Notes: This table is only a guide to the required qualifications, which are more complex.

a. Most standard and professional certificates are issued on an interim basis and become permanent after two to three years of successful teaching in the jurisdiction.

Sources: Relevant statutes and CEA publication, *Requirements for Teaching Certificates in Canada.*

Appendix E
Wording of Rights Declarations

Canadian Charter of Rights and Freedoms

Minority Language Educational Rights

23(1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instructon in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

General

29 Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under, the Constitution of Canada in respect of denominational, separate or dissentient schools.

Universal Declaration of Human Rights (United Nations)

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Appendix F
Constitution Act, 1867; Section 93

In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

1. Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any class of Persons have by Law in the Province at the Union:
2. All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
3. Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Provinces, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
4. In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

Appendix G
Legislative Provisions Regarding Denominational and Independent Schools

Jurisdiction	Legal Status Denominational Schools	Educational Controls on Independent Schools	Assistance and Funding Provided to Approved Independent Schools
Alberta	Separate schools if Roman Catholic or Protestant	Require approval of Minister of Education	Yes, lump sum per pupil, (approximately 50% of public school operating costs) plus "reading materials" grant
British Columbia	Not part of public school system	To receive grants must teach authorized courses, use approved teachers, etc.	Yes, 10% or 30% of public school operating costs according to classification into Group 1 or 2 by Inspector of Independent Schools
Manitoba	Not part of public school system	To receive grants must meet provide curriculum and standard of education equivalent to public schools and teachers must be certified	Yes, approximately 15% of public school operating costs, plus shared services agreements with local public schools, funded by province
New Brunswick	Not part of public school system but have informed arrangements to assist	—	—
Newfoundland	True denominational system	Require approval of Minister of Education	—
Northwest Territories	Separate schools if Roman Catholic or Protestant	Must be authorized by Executive Member, and are Protestant under supervision of Director of Education	—

Jurisdiction	Legal Status Denominational Schools	Educational Controls on Independent Schools	Assistance and Funding Provided to Approved Independent Schools
Nova Scotia	Not part of public school system, but have informal arrangements to assist	—	Legislation provides only for textbooks
Ontario	Separate schools if Roman Catholic (or Protestant)—funding	Monitoring only up to Grade 10	Curriculum materials only
Prince Edward Island	Not part of public school system, but have informal arrangements to assist	—	Legislation provides only for textbooks
Quebec	Dual Roman Catholic and Protestant public school systems	Must be authorized under Private Education Act, and employ qualified teachers	Grants of 60% of public school operating costs—80% if school classified as of "public interest"
Saskatchewan	Separate schools for Roman Catholic or non-Catholic	To receive grants must teach authorized courses	Approximately 50% of public school operating costs, for grades 9–12 only. Also capital grants of 10% of approved construction costs
Yukon	Separate schools for Roman Catholic or non-Catholic	—	—

Note: For purposes of this chart, if denominational schools are not part of the public system (see text), they are considered independent schools.

Appendix H
Extract from Committee Report

Extract from Chapter 29 — *Education*, 1972 Report of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada.

Many witnesses favoured a definite role in education for the Federal Government. Many others, particularly in Quebec, favoured the retention of, or return to, full Provincial jurisdiction in education, and opposed any interference by Federal authorities. The majority, however, supported the idea that, under a Federal system, and mainly for reasons of mobility, more coordination should be developed between various Provincial programs. Most of them suggested that a mechanism be provided for the coordination and cooperation of the Provinces in general educational policies; they also favoured the working out of a formula which, without affecting the jurisdiction of the Provinces in this field, would be in their best interest as well as that of the country as a whole.

After carefully considering all the views that were expressed across the country and fully respecting the concern of the Provinces, especially Quebec, the Committee has come to the conclusion that education as such should remain an exclusively Provincial power as at present under section 93 of the B.N.A. Act. Despite the undoubted value of a subordinate Federal role in education, especially in promoting bilingualism, we feel that it would be preferable for the Federal Parliament to pursue its legitimate goals in education, culture and research through existing Federal powers, like the spending power, rather than through a direct, even though subordinate, power in the field of education.

Notes

This paper was completed in July, 1984. The research assistance of Alan Nicholls is gratefully acknowledged.

1. British Columbia Regulation 325/77, Guide to the Core Curriculum Regulation.
2. During the early 1970s, court cases in the United States forced public schools there to provide educational opportunities to handicapped children, see e.g., *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (1971), 334 F. Supp. 1257 (U.S. Federal District Court, E.D. Pennsylvania) and *Mills v. Board of Education for the District of Columbia* (1972), 348 F. Supp. 866 (U.S. Federal District Court, D.C.). U.S. federal legislation dealing with education for the handicapped was enacted in 1975, see Education for All Handicapped Children Act of 1975, 20 U.S.C. SS.1400–1420, as amended. Generally, this act makes available certain federal monies to each state for the provision of educational opportunities to handicapped children provided that the state meets certain substantive and procedural standards. Without passing any final judgment on the merits of the U.S. legislation and the almost hundreds of court cases which it has prompted, it is fair to observe that most handicapped children are now receiving educational and other related services from school districts across the United States,

whereas prior to this legislation many handicapped children were not in the public education system at all.

The U.S. federal intervention into the states' educational jurisdiction seems to have been justified on the basis that it was "in the national interest that the federal government assist state and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." [20 U.S.C. S.1400 (b)(9)] The preamble to the 1975 Act indicated that there were more than eight million handicapped children in the United States and that the special educational needs of such children were not being met. It also indicated that one million of those children were excluded entirely from the public school system and that many others were not having a successful educational experience because the schools were unable to provide for their special needs. The preamble also indicated that appropriate funding was needed in order to provide for effective special education and related services.

3. An Economic Council of Canada study showed that in 1980 bilingual men earned 11 percent more, and bilingual women 12 percent more, than their unilingual counterparts.
4. The term "independent schools" includes, for the purposes of this paper, all elementary and secondary non-public schools.
5. Statistics Canada, Catalogue 81–002, Vol. 5, No. 5.
6. Chairman's and Executive Director's Annual Reports.
7. Introduction, *Support to Education by the Government of Canada*, Secretary of State, Ottawa, 1983.
8. For example, see Ivany et al., 1981, pp. 107–36.
9. Approximately 8 percent of all U.S. school revenues are from federal sources (Valente, 1980), p. 6.

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